No. 687

Nos. 13,599-13,600

BRIEF OF APPELLANT AND JOINT APPENDIX

Office - Supreme Court, U.S.
FILED
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JOHN T. FEY, Clerk

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED
DEC 17 1956
Joseph W. Stewart
CLERK

October Term, 1956.

No. 13,599

MURPHY AUTO PARTS CO., INC.,
Appellant,

v.

THOMAS CHARLES BALL,
Through his next friend
RITA H. BALL,
Appellees,

No. 13,600

MURPHY AUTO PARTS CO., INC.,
Appellants,

v.

GEORGE J. BALL, SR., and
RITA H. BALL,
Appellees.

Appeal from the United States District Court for the District of Columbia

R. SIDNEY JOHNSON
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Union Trust Building,
Washington 5, D. C.

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

STATEMENT OF QUESTIONS PRESENTED

The question is whether the declaration of a motorist whose car had struck a pedestrian, made at the scene shortly after the accident, to the effect that he was engaged in the performance of some business for his employer at the time and place of the collision, was admissible in an action against the employer as proof of the liability of the employer under the doctrine of respondeat superior, and whether the trial Court erred in submitting the case to the jury upon the question of agency, upon all of the evidence.

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Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the District Court, based on a jury verdict in favor of the appellees in an action for damages for personal injuries. This

Court has jurisdiction by virtue of Section 1291, Title 28, United States Code.

STATEMENT OF THE CASE

On the evening of October 20, 1952, James B. Murphy, an employee of the appellant, Murphy Auto Parts Co., a corporation, while off duty and driving his own private automobile from his place of employment in the appellant's store in Takoma Park, D. C., on his way to his home in Southeast Washington, struck and injured the appellee, Thomas Charles Ball, a minor, who ran in front of his car on Minnesota Avenue, near B. Street, Southeast. About a month thereafter, Civil Action No. 5224-52 was instituted in the Court below by said minor, through his mother and next friend, Rita H. Ball, against James B. Murphy, claiming damages for negligent injury of the boy. Some sixteen months later, the same plaintiffs filed Civil Action No. 943-55 against the appellant, alleging that at the time of the accident, James B. Murphy was operating his automobile on business of the appellant, and invoking the doctrine of respondeat superior. Thereafter, in September, 1955, the boy's parents, George J. Ball, Sr. and Rita H. Ball, filed Civil Action No. 4168-55 against both James B. Murphy and the appellant, for the recovery of damages sustained by them consequent upon the injuries to their son. These three actions were consolidated (R. 328, 333; J. App. 7, 12), and tried to a jury in June, 1956. The jury returned verdicts in favor of all plaintiffs against both defendants (R. 336, 337; J. App. 14, 15, 16).

Examination of the facts of the accident is not necessary, because the questions raised on this appeal concern only the liability of the appellant, Murphy Auto Parts Co., Inc., under the evidence.

The evidence at the trial was undisputed that James B. Murphy, at the time of the accident, was employed as a

counterman in the store of the appellant (R. 4, 72; J. App. 32, 33, 61, 62); that his duties were confined to receiving orders from customers in the store, or over the telephone (R. 5, 7-9; J. App. 33, 35, 36, 53), and delivering the merchandise sold to the customer in the store, or handing it to delivery men employed by the company, who made the deliveries in trucks owned and operated by it for that purpose (R. 12, 36, 71-74, 76; J. App. 38, 52, 62, 63). He had no authority to call on customers or make deliveries outside the store, and did not do so (R. 5, 9, 37, 75; J. App. 33, 36, 53, 54, 63). He received a salary of fifty dollars a week, and in addition thereto a sum of ten dollars a week (R. 7; J. App. 34), which was carried on the books of the corporation as a "car allowance" (R. 13-15; J. App. 38-40). His regular hours of employment by the appellant were from 8:00 o'clock A. M. to 5:00 o'clock P. M. daily (R. 8, 9; J. App. 35).

It was testified that James B. Murphy began working for the appellant while he was attending the University of Maryland (R. 4; J. App. 33), and acted as a part time counterman in the appellant's store, using his own automobile in traveling from the University to the store. Milburn L. Murphy, president of the corporation, is his foster father (R. 68; J. App. 59). His mother, Florence Murphy, was also employed by the appellant (R. 4; J. App. 33). James was paid the ten dollar weekly allowance, in addition to a small weekly salary to help him get through school (R. 12, 76-79; J. App. 38, 39, 64). After he completed his schooling at the University, he commenced working full time for the company, and the car allowance was continued (R. 12-14, 20, 40-44; J. App. 38, 39, 43, 54-59), and was still in effect on the day of the accident here involved. The allowance was considered to be merely an adjunct to his salary (R. 77-79; J. App. 64, 65), and he testified that he used the money to defray his expenses in driving his car from his home to work and back (R. 44; J. App. 57).

There was no evidence that James used his car on company business, or for calling on customers of the appellant, or for making deliveries. All of the evidence was that he did not so use his car (R. 83, 84; J. App. 68, 69). There was no evidence that at the time of the accident he held any other position with the appellant, or had any occasion to use his car in the company's business.

The transactions with customers on the day of the accident, October 20, 1952, were reflected by the sales slips made out by the countermen in the store, which were introduced by the appellees' counsel (R. 23; J. App. 45-52). A number of these slips showed sales made by James Murphy in the store that day while he was on duty, but none of them bore evidence of any deliveries made by him out of the store, or any necessity therefor. There was no sale shown to have been made to any customer in Southeast Washington (R. 23-37; J. App. 45-52).

The uncontroverted evidence showed that at 5:00 o'clock on the evening of the accident (R. 62; J. App. 58), James Murphy, having completed his day's work for the appellant, entered his private automobile (R. 21; J. App. 44), which was parked at the rear of the store (R. 62; J. App. 58), and when the accident occurred, at about 6:15 o'clock P. M., had traveled a distance of some ten miles (R. 20, 40; J. App. 44, 54) toward his home (R. 44, 45; J. App. 57, 58), a trip across the city that usually consumed over an hour at that time of day. He had no business to transact for the appellant after leaving the store (R. 45, 62, 63; J. App. 57, 58), and was not due back on duty until 8:00 o'clock A. M. the succeeding day (R. 63; J. App. 58).

The only evidence offered by the appellees to prove that James B. Murphy was engaged in the performance of any business for the appellant when the accident happened was the uncorroborated testimony of Mrs. Rita H.

Ball, who said that she alighted from a bus near the scene of the accident shortly after her son had been injured, and was approached on the street by James B. Murphy (R. 102-104; J. App. 80, 81); that he "Told me that he was sorry, that he hoped my son wasn't seriously hurt, he had to call on a customer and was in a bit of a hurry to get home" (R. 105; J. App. 81).

Appellant's counsel promptly objected and moved the Court to strike this testimony on the ground that the quoted declaration of James Murphy was inadmissible, as against the appellant, to prove the scope of hi employment or that he was engaged upon appellant's business when the accident occurred (R. 105-112; J. App. 82-87). The objection was overruled, and the testimony of Mrs. Ball as above quoted was admitted into evidence (R. 112; J. App. 86-87). James B. Murphy denied making any such statement to Mrs. Ball (R. 66, 67; J. App. 58-59).

The court thereafter denied appellant's motions for a directed verdict at the close of the appellees' evidence, and at the conclusion of all of the evidence, and declined to instruct the jury in accordance with appellant's Prayer No. 2 (R. 335; J. App. 17), and over appellant's objection, (R. 195, 196; J. App. 116, 117), granted appellees' Prayer No. 19 (R. 334; J. App. 16), and instructed the jury that they could take into consideration the declarations of James B. Murphy made at the scene of the collision, if they believed that he made them, in determining whether he was acting within the scope of his employment at the time and place of the accident (R. 481; J. App. 108). The appellant moved for a new trial, or in the alternative for judgment non obstante veredicto (R. 338; J. App. 18, 19), which motion was denied by the Court (R. 340; J. App. 19).

STATEMENT OF POINTS

1. The Court erred in admitting into evidence testimony as to declarations or admissions of James B. Mur-

phy, made at the scene following the accident, as evidence that he was acting within the scope of his employment by the appellant when the collision occurred.

2. The Court erred in denying the motion of appellants to strike the aforesaid testimony.

3. The Court erred in overruling the appellant's motion for a directed verdict in its favor.

4. The Court erred in denying appellant's requested instruction No. 2.

5. The Court erred in granting appellees' requested instruction No. 19.

6. The Court erred in submitting the case to the jury under the evidence.

7. The Court erred in denying the appellant's motion to set aside the verdict and for judgment non obstante veredicto.

SUMMARY OF ARGUMENT

1. The evidence showed that James B. Murphy was not acting within the scope of his employment at the time and place of the accident involved.

2. The erroneous admission into evidence of the testimony as to declarations made by James B. Murphy relating to the scope of his employment was prejudicial error.

ARGUMENT

I.

The appellees had the burden of establishing by evidence that on the occasion in question James B. Murphy was operating his automobile upon some business for his employer, or within the scope of his employment. *Bendheim* v. *Pigford*, 31 App. D. C. 488. It is to be noted

that no presumption of agency arises from the facts in the case. That James Murphy was driving his own automobile at the time of the accident is undisputed.

In attempting to carry the burden of proof, the appellees called to the stand the defendant James B. Murphy, and Milburn L. Murphy, president of the appellant, Murphy Auto Parts Co., Inc., and elicited from them facts which proved the exact contrary of their contentions, to wit, that at the time of the collision James had concluded his day's work for the appellant, and was in the act of driving to his home in pursuance of purposes entirely his own, having no business of the appellant to perform on the way; that his employment by the appellant was that of a counterman in its store, and that his duties as such were to receive orders and make sales in the store; that he was not required, in the performance of those duties to travel from the store, to call on customers, or to make deliveries; that he was not authorized to perform such acts, and had not been known or permitted to do so at any time prior to the date of the accident.

Having called their adversaries as witnesses, and failed to contradict their testimony or proved it to be false, the appellees were concluded by the testimony so elicited. *Moran* v. *Pittsburgh-Des Moines Steel Co.*, 86 F. Supp. 255, in which the Court said:

> "The general rule is that a party calling his adversary as a witness vouches, at least to some extent, for his credibility, and is concluded by his testimony so elicited if it is not contradicted or proved false, and this rule also applies to testimony so elicited from an officer, employee, or servant of the adverse party."

Certain interrogatories and answers, and a memorandum relating thereto, were offered by the appellees in an effort to show that contrary admissions had been made of record by the appellant, but that evidence was rejected

by the Court when it became apparent that the statements of the witness contained therein did not refer to the year 1952, or definitely to the day of the accident (R. 84-101; J. App. 68-80). Therefore, the appellees succeeded in proving only that James Murphy was not acting within the scope of his employment, but was engaged in his own personal pursuits when the collision occurred, and there the case against the appellant completely failed, for it is settled law in this jurisdiction, and indeed universally, that a principal is not liable for his agent's tort unless it is within the scope of the agent's employment, and it is not within the scope of the employment if it is done for the agent's purposes only.

M. J. Cline Co. v. *Cashdan*, 84 U. S. App. D. C. 58, 171 F.2d 132.
Park Transfer Co. v. *Lumbermens Mut. Cas. Co.*, 79 U.S.App.D.C. 48, 142 F.2d 100.
Lucas v. *Friedman*, 58 App. D. C. 5, 24 F.2d 271.

Appellees' counsel appeared to attach considerable importance to the fact that James Murphy received from his employer an allowance of ten dollars a week in addition to his regular salary, this allowance being described on the company's books of account as a "car allowance". It was made perfectly clear by the testimony of the two Murphys that this allowance was not made for any expense of James for operation of his car on company business, and all of the evidence was to the effect that he did not make such use of his car. The fact that the money so allowed was intended or used to defray the expenses of operating his automobile while off duty, driving to and from his home, or to and from the University of Maryland at the time he was attending classes there, or for other purely private purposes, was insufficient to establish any general agency of authority on behalf of the Murphy Auto Parts Co., Inc., which would render that company responsible for tortious or negligent acts committed by James Murphy while so using his car.

There was nothing in the evidence to show that James was held accountable in any way to the company for his use of the "car allowance", or that he was obligated to expend the money so paid him solely for the operation of his car. So far as the evidence shows he was perfectly free to mingle the amount with his other funds and to use it in any way he wished. It is clear that the allowance was intended only as additional compensation, or as an adjunct to James' regular salary, and under all of the evidence no other inference could reasonably be drawn. Whether or not the item was properly entered or carried on the company's books from an accounting or tax standpoint is not a question that is material or relevant to the substantive issue of agency. The appellant company exercised no control or supervision over the use of his car by James. He was apparently at liberty to drive it where he pleased while he was not on duty in the appellant's store.

> "The usual test in such circumstances, that is to say, the determination of liability for a negligent act on the part of a servant, is the right or the power on the part of the person charged, to command and control the servant in the performance of the causal act at the moment of performance." *Phelps* v. *Boone*, 62 App. D. C. 308, 67 F.2d 574.
>
> *Consolidated Home Equipment Co.* v. *Crossland*, 78 App. D. C. 54, 137 F.2d 675.

In *Postal Telegraph-Cable Co.* v. *Thomas*, 65 App. D.C. 351, 83 F.2d 608, this Court quoted with approval the following from the opinion in *Green* v. *Western Union Telegraph Co.* (Mo. App. 1933) 58 S.W.2d 772, 773:

> "If the act resulting in the injury is committed by the servant at a time when he is off duty, as for instance, after the day's work is completed, or at noon hour, or where the servant has been given a holiday, the master will not be liable therefor; and it has been held that this is so, although the act is one which, if done by the servant while on duty and at a time

when actually engaged in the master's service, would be within the course and scope of his usual and ordinary duties."

Where the uncontroverted proof showed that James Murphy was operating his private automobile while off duty and for purposes entirely his own, the question of the responsibility of the appellant was one of law for the Court, and not one of fact for the jury. *Curry* v. *Stevenson*, 58 App. D. C. 162. It certainly cannot be said that upon consideration of all the evidence in this case fair-minded men might honestly differ as to whether James Murphy was engaged in performing the duties of his employment when the accident took place. *Lucas* v. *Friedman*, 58 App. D. C. 5, 24 F.2d 271.

The evidence wholly failed to meet the test prescribed by the decisions above referred to, and it was the plain duty of the trial judge to have withdrawn the case from the jury, and directed a verdict insofar as the appellant was concerned.

II.

The rule of law that the admissions of an agent may never be used to prove the agency is generally recognized and settled. It is the law of this jurisdiction. *Peabody* v. *Marlboro Implement Co.*, 63 App. D. C. 288, 72 F.2d 81, certiorari denied, 293 U. S. 601, 55 S.Ct. 118, 79 L.Ed. 693; *Adams Express Co.* v. *Berry & Whitmore Co.*, 35 App. D. C. 208, 213.

It is also well settled that the declaration of an agent as to the scope of his employment or authority is inadmissible, as against his employer, even though the declaration was made as a part of the res gestae.

In 163 A. L. R. 198n, numerous cases are collected under the headnote reading as follows:

"By the weight of authority, the declaration of one alleged to have caused an accident that he was em-

ployed by the defendant, or that he was then engaged in some business for the defendant, is inadmissible, even though made under such conditions as would otherwise qualify it as a part of the res gestae."

The leading Federal case is *Dudley* v. *Preston Motor Company* (1931) 51 F.2d 8, where the Court said:

"Considering the evidence in its most favorable light for appellant, we conclude that it does not substantially show that at the time of the accident Roberts was engaged in any business for appellee or that appellee had either expressly or impliedly authorized him to use the automobile upon that occasion. We think that he was upon a trip entirely personal to himself, and that there is no substantial relevant evidence to the contrary, and the judgment therefore should be affirmed. See *Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 254, 45 S.Ct. 300, 69 L.Ed. 597; *American Oil Co.* v. *Frederici*, 47 F.2d 54, 57 C.C.A. 6.

"Appellant testified that at the time of the accident, and after his son had been taken out of the wrecked car, Roberts made the statement to him which he repeated the succeeding day in the presence of Preston and Kilpatrick as above indicated. This testimony was offered as a part of the res gestae, and its introduction was denied. We think there was no error in its denial. It threw no light upon the cause of the collision. The manifest purpose of appellant in the introduction of it was to use this declaration of Roberts as evidence of his agency for which purposes it was, of course, incompetent."

The authorities collected under 163 A.L.R. 198n, are supplemented by others to the same effect in A.L.R 2d 606.

The testimony of Mrs. Rita H. Ball that James Murphy stated to her at the scene of the accident that "he had to call on a customer" was manifestly offered for the purpose of proving agency in a case where by all of the other evidence none existed. The erroneous admission

of that declaration formed the only evidenciary basis for sending the case to the jury on the question of agency, and under the Court's charge, the verdict of the jury must have been based upon that evidence. If the Court had granted appellant's motion to strike and properly excluded the declaration, it would have been its duty to instruct a verdict for the appellant.

The Court below seems to have considered that the decision of this Court in the case of *Kas* v. *Gilkerson*, 91 U.S.App.D.C. 153, 199 F.2d 398, afforded some precedent for the admission of the declaration testified to by Mrs. Ball (R. 107; J. App. 83, 84). But the question here discussed was not involved in that case, either in the trial court, or on appeal. The trial court appears to have admitted testimony of a policeman to the effect that the truck driver, operating his employer's truck involved in a collision, stated at the scene of the accident that he had made a delivery for his employer. That evidence was apparently not objected to at the trial, and was not questioned or considered on appeal. The case turned on the point that the truck driver had gone off on a journey of his own when the accident occurred, and this Court, applying the law of Maryland, reversed the judgment on the ground that the agent had deviated from the scope of his employment, and held the employer not liable under those circumstances.

CONCLUSION

The Court erred in admitting into evidence the testimony as to declarations made at the scene after the accident, for the reason that said declarations were incompetent and inadmissible as proof that James B. Murphy was acting within the scope of his employment at the time of the accident; and the Court erred in submitting the case to the jury on the question of agency, under all the evidence; and that the Court further erred in over-

ruling the appellant's motion to set aside the verdict and for judgment non obstante veredicto; and, for the reasons urged herein, the action of the Court below should be reversed.

R. Sidney Johnson
Guy B. Hardy
Attorneys for Appellant,
Union Trust Building,
Washington 5, D. C.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,599

MURPHY AUTO PARTS CO., INC.,
Appellant,

v.

THOMAS CHARLES BALL, through his next friend, RITA H. BALL,
Appellee.

No. 13,600

MURPHY AUTO PARTS CO., INC.,
Appellant,

v.

GEORGE J. BALL, SR., and RITA H. BALL,
Appellees.

Appeals from the United States District Court for the District of Columbia

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JOINT APPENDIX

324 Filed Mar 2 1955 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS CHARLES BALL, 305 - 37th St., S.E.,
Washington, D. C., through his next friend
RITA H. BALL, 305 - 37th St., S.E.,
Washington, D. C.,
Plaintiffs

vs.

MURPHY AUTO PARTS CO., INC., A Corporation
313 Cedar, N.W., Washington, D. C.,
Defendant

Civil Action No. 943-'55

COMPLAINT FOR DAMAGES

1. Plaintiff is a citizen of the United States, an infant, and a resident of the District of Columbia.

2. Plaintiff Rita H. Ball is a citizen of the United States, a resident of the District of Columbia, and the mother of plaintiff Thomas Charles Ball.

3. Defendant Murphy Auto Parts Co., Inc. is a corporation doing business within the District of Columbia and is amenable to process.

4. Plaintiff says unto the Court that on or about October 20, 1952, while exercising due care, plaintiff Thomas Charles Ball was crossing the street at Minnesota Avenue and B Street, S.E.

5. Plaintiff says unto the Court that one James B. Murphy, not named as a defendant herein, was driving an atuomobile in a negligent manner and at an excessive speed, did not give full time and attention while driving, negligently failed to keep a proper lookout, operated the

vehicle in a negligent manner, contrary to local traffic regulations, that he collided with plaintiff Thomas Charles Ball who was crossing the street, ran over the plaintiff causing severe and permanent injuries to plaintiff.

325 6. Plaintiff says unto the Court that James B. Murphy is an agent of the defendant Murphy Auto Parts Co., Inc. and that when the accident occurred on October 20, 1952, James B. Murphy was acting as an employee and agent of the defendant Murphy Auto Parts Co., Inc. and was working within the scope of his employment for the defendant Murphy Auto Parts Co., Inc. when the collision occurred.

7. Plaintiff says unto the Court that the defendant Murphy Auto Parts Co., Inc. contributes funds to Mr. James B. Murphy to defray the expenses incident to the use of his automobile as he contacts customers in the District of Columbia and plaintiff says unto the Court that on the day in question and that at the time the collision occurred, James B. Murphy was doing business for the defendant Murphy Auto Parts Co., Inc. and was working within the scope of his employment.

8. Plaintiff says unto the Court that he suffered permanent injuries as a result of the collision including fracture of the skull, cerebral concussion, fracture of the right leg, lacerations of the right forehead and plaintiff says that said injuries are permanent and that plaintiff has had continuous headaches since the accident.

WHEREFORE, the premises considered, plaintiff prays:

1. For compensatory damages in the amount of $50,000.00 against the defendant Murphy Auto Parts Co., Inc., and

2. For such other and further relief as the Court may deem just and proper.

/s/ Albert J. Ahern, Jr.
Albert J. Ahern, Jr.
National Press Building
Counsel for Plaintiffs

Plaintiffs demand trial by jury.

326 Filed Mar 22 1955 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS CHARLES BALL, 305 - 37th Street, S.E.
Washington, D. C.,
Through his next friend
RITA H. BALL, 305 - 37th Street, S.E.
Washington, D. C.
Plaintiffs

vs.

MURPHY AUTO PARTS CO., INC., A Corporation
313 Cedar, N.W., Washington, D. C.
Defendant

Civil Action No. 943-55

ANSWER OF DEFENDANT TO COMPLAINT

First Defense

The Complaint fails to state a claim against this defendant upon which relief may be granted.

Second Defense

1-2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allega-

tions contained in paragraphs one and two of the Complaint.

3. Admitted.

4. Defendant admits that on or about October 20, 1952, the infant plaiatiff was crossing Minnesota Avenue from the east side to the west side thereof, but defendant denies all remaining allegations contained in paragraph four of the Complaint.

5. Defendant admits that one James B. Murphy was driving an automobile which was in collision with the infant plaintiff, but this defendant denies all other allegations contained in paragraph five of the Complaint.

6. The defendant denies that at the time of the accident referred to in the Complaint, James B. Murphy was acting as its agent or employee and further denies that the said James B. Murphy was working within the scope of his employment when the collision occurred.

7. The defendant admits that it pays an allow-
327 ance to Murphy for the use of the automobile which he was operating, but that such allowance is only for the use of the automobile made by James B. Murphy in calling on customers of this defendant during business hours and this defendant alleges that at the time of the accident alleged in the complaint the said James B. Murphy was not engaged in or doing any business for this defendant, was not working nor acting within the scope of his employment and was not entitled to nor did he receive any allowance for the use of his automobile at the time of the alleged accident herein.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph eight of the Complaint.

Third Defense

The defendant alleges that the damages and injuries, if any, sustained by the plaintiff herein resulted from his sole negligence and/or contributory negligence.

BURTON, HEFFELFINGER, McCARTHY & KENDRICK
By:

/s/ Thomas B. Heffelfinger
Thomas B. Heffelfinger
Attorneys for Defendant
1005 Investment Building
Washington 5, D. C.

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing Answer was mailed, postage prepaid, this 21st day of March, 1955, to Albert J. Ahern, Jr., Esq., National Press Building, Washington, D. C., Attorney for Plaintiffs.

/s/ Thomas B. Heffelfinger
Thomas B. Heffelfinger
Attorney for Defendant,
Murphy Auto Parts Co., Inc.

328 Filed Apr 6 1955 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5224-52

THOMAS CHARLES BALL through his next friend
RITA H. BALL,
Plaintiffs

vs.

JAMES B. MURPHY,
Defendant

ORDER

Upon application of the plaintiff to consolidate and the Court having heard argument of counsel, it is by the Court, this 5 day of April, 1955,

ORDERED, That the motion to consolidate the above entitled cause with the case of Ball vs. Murphy Auto Parts Co., Inc., Civil Action No. 943-55 be, and the same is, hereby granted and both causes are consolidated for trial.

BY THE COURT:

/s/ Alexander Holtzoff
United States District Judge

I hereby certify that I have this 4th day of April, 1955, mailed copies of the foregoing Order to Albert F. Beasley, Esq., Investment Building, Washington 5, D. C., Counsel for Defendant James B. Murphy and Thomas B. Heffelfinger, Esq., 1005 Investment Building, Washington 5, D. C., Counsel for Defendant Murphy Auto Parts Co., Inc. in Civil Action No. 943-55.

/s/ Albert J. Ahern, Jr.
Albert J. Ahern, Jr.
National Press Building
Counsel for Plaintiff

329 Filed Sep 21 1955 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4168-'55

GEORGE J. BALL, Sr., 4256 Southern Avenue, S.E.
Washington, D. C., and
RITA H. BALL, 4256 Southern Avenue, S.E.
Washington, D. C.,
Plaintiffs

vs.

JAMES B. MURPHY, 3107 G Street, S.E.
Washington, D. C. and
MURPHY AUTO PARTS CO., INC., A Corporation
313 Cedar, N.W., Washington, D. C.,
Defendants

COMPLAINT FOR DAMAGES

1. The plaintiff George J. Ball, Sr. is a citizen of the United States, a resident of the District of Columbia and the father of Thomas Charles Ball, infant.

2. The plaintiff Rita H. Ball is a citizen of the United States, a resident of the District of Columbia, the mother of the infant Thomas Charles Ball and his next of friend in Civil Action Nos. 5224-52 and 943-55.

3. The defendant James B. Murphy is a citizen of the United States and a resident of the District of Columbia and is the defendant in Civil Action No. 5224-52.

4. Defendant Murphy Auto Parts Co., Inc. is a corporation doing business within the District of Columbia, is amenable to process and is the defendant corporation in Civil Action No. 943-55.

5. Plaintiffs say unto the Court that on or about October 20, 1952, while exercising due care, their infant son Thomas Charles Ball was crossing the street at Minnesota Avenue and B Street, S.E.

330 6. Plaintiffs say unto the Court that the defendant James B. Murphy operated his automobile in a negligent manner and at an excessive speed, did not give full time and attention while driving, negligently failed to keep a proper lookout, operated his vehicle in a negligent manner, contrary to legal traffic regulations; that he collided with the infant son Thomas Charles Ball who was crossing the street, causing plaintiffs' infant son severe and permanent injuries.

7. Plaintiffs say unto the Court that at the time of the collision the defendant James B. Murphy was an agent of the defendant Murphy Auto Parts Co., Inc. and that at the time of the collision on October 20, 1952 he was working within the scope of his employment for the defendant Murphy Auto Parts Co., Inc.

8. Plaintiffs say unto the Court that as mother and father of the minor child Thomas Charles Ball and as a result of the severe injuries their child has received, they have incurred, and will in the future incur, substantial expenses for his medical care and treatment and they have lost, and will in the future lose, the services and society of said minor son; that said plaintiffs have lost time from work and will in the future lose further time from work in caring for said child all to the damage of plaintiffs George J. Ball, Sr. and Rita H. Ball individually in the sum of Twenty Thousand Dollars ($20,000.00).

WHEREFORE, plaintiffs George J. Ball, Sr. and Rita H. Ball, individually, demand judgment against the defendants James B. Murphy and Murphy Auto Parts Co.,

Inc. in the sum of Twenty Thousand Dollars ($20,000.00) besides costs.

Plaintiffs demand trial by jury.

/s/ Albert J. Ahern, Jr.
Albert J. Ahern, Jr.
National Press Building
Counsel for Plaintiffs

331 Filed Oct 21 1955 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division.

GEORGE J. BALL, Sr., and RITA H. BALL,
Plaintiffs,

vs.

JAMES B. MURPHY, and
MURPHY AUTO PARTS CO., INC.
Tacoma Pk., D.C.
Defendants.

Civil Action No. 4168-55

ANSWER OF DEFENDANT
MURPHY AUTO PARTS CO., INC.

Comes now the defendant, Murphy Auto Parts Co., Inc., by its attorneys, and, for answer to the complaint exhibited against it in the above-entitled action, says that:

First Defense

The complaint fails to state a claim against this defendant upon which any relief can be granted.

Second Defense

This defendant admits the allegations of paragraphs 1, and 2, of said complaint. As to paragraph 3 of the complaint, this defendant avers, upon information and

belief that the defendant James B. Murphy is a resident of the State of Maryland. It admits the allegations of paragraph 4 of the Complaint.

The allegations of paragraphs 5, 6, 7, and 8 of the Complaint are denied.

Third Defense

This defendant avers that at the time of the alleged collision between the automobile of the defendant, James B. Murphy, and the infant son of the plaintiffs, on October 20, 1952, said defendant was operating his own personal automobile in pursuit of his private and personal business and affairs, and was not in any sense acting upon the business and affairs of this de-
332 fendant, as the agent, servant, employee, or officer of this defendant, or with its knowledge, consent, or authority.

Fourth Defense

This defendant avers that if the plaintiffs sustained losses and damages as alleged in said Complaint the same were caused or contributed to by the negligence of the plaintiffs in failing to exercise appropriate control and supervision over their said infant son.

Fifth Defense

This defendant avers that the losses, injuries and damages of which the plaintiffs complain, if any, were caused by the negligence of their said minor son, Thomas Charles Ball, and without any fault or neglect, in any manner, on the part of this defendant.

/s/ R. Sidney Johnson
R. Sidney Johnson

/s/ Guy B. Hardy
Guy B. Hardy
Attorneys for Defendant.
Murphy Auto Parts Co., Inc.
Union Trust Building,
Washington 5, D. C.

CERTIFICATE OF SERVICE

I hereby certify that I have, this 21st day of October, 1955, served the aforegoing answer upon the plaintiffs by mailing a copy thereof, postage prepaid, to their attorney of record, Albert J. Ahern, Jr., Esquire, National Press Bldg., Washington, D. C., and upon the defendant, James B. Murphy, by mailing a copy thereof, postage prepaid, to his attorney of record, Albert F. Beasley, Investment Building, Washington, D. C.

/s/ R. Sidney Johnson
R. Sidney Johnson

333 Filed Nov 23 1955 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

GEORGE J. BALL, Sr., and
RITA H. BALL,
Plaintiffs

vs.

JAMES B. MURPHY and
MURPHY AUTO PARTS CO., INC.
Defendants

Civil Action No. 4168-55

ORDER

This cause came on to be heard upon the motion of the plaintiffs to consolidate the above-entitled cause with the causes of Civil Action No. 5224-52 entitled Thomas Charles Ball through his next friend Rita H. Ball vs. James B. Murphy and Civil Action No. 943-55 entitled Thomas Charles Ball through his next friend Rita H. Ball vs. James B. Murphy and Murphy Auto Parts Co., Inc., and it is by the Court this 23 day of November, 1955,

ORDERED, That the motion to consolidate be, and the same is, hereby granted.

BY THE COURT:

/s/ Edward M. Curran
United States District Judge

I hereby certify that I have this 22nd day of November, 1955 mailed copies of the foregoing Order to Albert F. Beasley, Esq., Investment Building, Washington, D. C., Counsel for Defendant James B. Murphy and to R. Sidney Johnson, Esq., Union Trust Building, Washington, D. C., Counsel for Defendant Murphy Auto Parts Co., Inc.

/s/ Albert J. Ahern, Jr.
Albert J. Ahern, Jr.
National Press Building
Counsel for Plaintiffs

336 Filed Jun 20 1956 Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS CHARLES BALL, through his next friend, Rita H. Ball
Plaintiff.

vs.

JAMES B. MURPHY
MURPHY AUTO PARTS COMPANY, INC., a corporation
Defendant.

Civil No. 5224-52, 943-55, 4168-55

VERDICT AND JUDGMENT

This cause having come on for hearing on the 11th day of June, 1956, before the Court and a jury of good and

lawful persons of this district, to wit:

Francis B. Silsbee
John H. Hunter, Jr.
Roland E. Moore
Louis F. Orth
George M. Beu
Miss Elsie Rodenhouser
Mrs. Imogene R. Brice
Anton W. Thalmayer
Miss Dorothy M. Rhodes
Samuel P. Stewart
Mrs. Marion T. Boyd
Miss Mignon L. Ricks

who, after having been duly sworn to well and truly try the issues between Thomas Charles Ball, through his next friend, Rita H. Ball, plaintiff and James B. Murphy and Murphy Auto Parts Company, Inc., defendants, and after this cause is heard and given to the jury in charge, they upon their oath say this 20th day of June, 1956, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendants by reason of the premises is the sum of seventeen thousand five hundred dollars ($17,500.00).

WHEREFORE, it is adjudged that said plaintiff recover of the said defendant the sum of seventeen thousand five hundred dollars ($17,500.00) together with costs.

HARRY M. HULL, Clerk,

By /s/ Charles D. Hutchinson,
Deputy Clerk.

By direction of
Judge EDWARD M. CURRAN

337 Filed Jun 2 1956 Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RITA H. BALL
GEORGE J. BALL, SR.
Plaintiff.

vs.

JAMES B. MURPHY
MURPHY AUTO PARTS CO., INC.,
a corporation
Defendant.

Civil No. 5224-52, 943-55, 4168-55

VERDICT AND JUDGMENT

This cause having come on for hearing on the 11th day of June, 1956, before the Court and a jury of good and lawful persons of this district, to wit:

Francis B. Silsbee
John H. Hunter, Jr.
Roland E. Moore
Louis F. Orth
George M. Beu
Miss Elsie Rodenhouser
Mrs. Imogene R. Brice
Anton W. Thalmayer
Miss Dorothy M. Rhodes
Samuel P. Stewart
Mrs. Marion T. Boyd
Miss Mignon L. Ricks

who, after having been duly sworn to well and truly try the issues between Rita H. Ball and George J. Ball, Sr., plaintiffs and James B. Murphy and Murphy Auto Parts Company, Inc., defendants, and after this cause is heard

and given to the jury in charge, they upon their oath say this 20th day of June, 1956, that they find the issues aforesaid in favor of the plaintiffs and that the money payable to him by the defendants by reason of the premises is the sum of four thousand dollars ($4000.00).

WHEREFORE, it is adjudged that said plaintiffs recover of the said defendants the sum of four thousand dollars ($4000.00) together with costs.

HARRY M. HULL, Clerk.

By /s/ Charles D. Hutchinson,
Deputy Clerk.

By direction of
Judge EDWARD M. CURRAN

334 Filed Jun 19 1956 Harry M. Hull, Clerk

PLAINTIFFS' INSTRUCTION NO. 19

The jury is instructed that in determining whether the defendant James B. Murphy was working within the scope of his employment you may take into consideration all the circumstances surrounding that employment—declarations made by the defendant James B. Murphy at the scene of the collision if you believe that he made them; also you may consider James Murphy's denial if you believe that he made no such declaration—and if, after viewing all the evidence, you believe that he was working within the scope of that employment, even though he may have had some personal business of his own at the same time, you are still justified in finding a verdict against the defendant Murphy Auto Parts Co., Inc., provided of course that you find that James Murphy was negligent and that the negligence was the proximate cause of the accident.

Granted as amended.

335 Filed Jun 19 1956 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS CHARLES BALL, et al.,
Plaintiffs,

v.

JAMES B. MURPHY, et al.,
Defendants.

Civil Action No. 5224-52 et al.,

CORPORATE DEFENDANT'S PRAYER NO. 2

The plaintiff, Mrs. Rita Ball, has testified to a certain statement alleged to have been made to her at the scene of the accident, and shortly after it occurred, by James B. Murphy, to the effect that he had to call on a customer and was in a hurry to get home. You are instructed that the statement referred to, if you find that it was made, is not binding upon the defendant, Murphy Auto Parts Company, Inc., and must not be considered by you as evidence tending to prove that James B. Murphy was acting within the scope of his employment at the time and place of the accident.

Denied.

338 Filed Jun 30 1956 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS CHARLES BALL, et al.,
Plaintiffs,

vs.

JAMES B. MURPHY, et al.,
Defendants.

Civil Action No. 4168-55 et al.

MOTION OF DEFENDANT MURPHY AUTO PARTS COMPANY, INC., FOR A NEW TRIAL, OR IN THE ALTERNATIVE FOR JUDGMENT NON OBSTANTE VEREDICTO

Now comes the defendant, Murphy Auto Parts Company, Inc., by its counsel of record, and moves this Honorable Court for a new trial, or, in the alternative, for judgment notwithstanding the verdict in the above entitled cause, and for reasons states as follows:

1. The verdict was contrary to the law.

2. The verdict was contrary to the evidence.

3. It was error for the court to admit into evidence as against this defendant the testimony of Mrs. Rita Ball as to the statement or admission alleged to have been made to her by the defendant James B. Murphy following the accident as evidence of the scope of the authority of the said James B. Murphy as an employee or agent of this defendant.

4. It was error for the court to fail to direct a verdict in favor of this defendant at the close of the plaintiffs' evidence.

5. It was error for the court to fail to direct a verdict in favor of this defendant at the close of all of the evidence.

6. It was error for the court to fail to instruct the jury in accordance with this defendant's prayer No. 3A.

7. For additional reasons of said motion this defendant adopts by reference the grounds stated by the defendant James B. Murphy in his motion to set aside the verdict and judgment for plaintiffs and enter judgment for defendants or in the alternative to set aside
339 the verdict and judgment for plaintiff and order a new trial.

8. And for such other and further reasons as may be presented at the hearing on this motion.

/s/ R. Sidney Johnson
R. Sidney Johnson

/s/ Guy B. Hardy
Guy B. Hardy
Attorneys for Defendant
Murphy Auto Parts
Company, Inc.

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing motion, and of the points and authorities in support thereof were served upon the plaintiffs by mailing the same, postage prepaid, to their attorney of record, Albert J. Ahern, Jr., Esquire, National Press Building, Washington, D. C., and upon the defendant James B. Murphy, by mailing the same, postage pre-paid, to his attorney of record, Albert F. Beasley, Esquire, Investment Building, Washington, D. C. this 30th day of June, 1956.

/s/ R. Sidney Johnson
R. Sidney Johnson

340 Filed Aug 30 1956 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Thomas Charles Ball, et al
Plaintiffs

v.

Murphy Auto Parts, Inc. et al
Defendants

Civil Action No. 4168-55, 5224-52, 943-55

ORDER DENYING MOTIONS

This cause having come on to be heard on the motions filed by the defendant James B. Murphy to set aside the verdict and judgment or in the alternative to order a new trial and the motions filed by the defendant Murphy Auto Parts, Inc. for a new trial or in the alternative for judgment non obstante veredicto and upon consideration thereof it is by the Court this 30 day of August, 1956

ORDERED that all of the above described motions be and they are hereby denied.

BY THE COURT

/s/ Edward M. Curran
United States District Judge.

341 Filed Sep 28 1956 Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS CHARLES BALL, etc.,
Plaintiff,

vs.

MURPHY AUTO PARTS CO., INC.,
Defendant

Civil Action No. 943-55

GEORGE J. BALL, et al
Plaintiffs,

vs.

MURPHY AUTO PARTS CO., INC.,
Defendant.

Civil No. 4168-55

NOTICE OF APPEAL

Notice is hereby given this 28th day of September, 1956, that the MURPHY AUTO PARTS CO., INC., defendant in the above-entitled consolidated causes, Civil Actions Nos. 943-55 and 4168-55 hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 20th day of June, 1956 in favor of the plaintiff, THOMAS CHARLES BALL, etc. in Civil Action No. 943-55, and plaintiff, GEORGE J. BALL, et al. in C.A. No. 4168-55 against said MURPHY AUTO PARTS CO., INC.

/s/ R. Sidney Johnson
R. Sidney Johnson

/s/ Guy B. Hardy
Guy B. Hardy
Attorney for Defendant,
Murphy Auto Parts Co.

Copies to
Albert J. Ahern, Esq.
Attorney for Plaintiffs
National Press Building
Albert F. Beasley, Esq.
Attorney for Deft. James B. Murphy
Investment Bldg.

342 Filed Sep 28 1956 Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS CHARLES BALL, etc.,
Plaintiff,

vs.

MURPHY AUTO PARTS CO., INC.,
Defendant.

Civil Action No. 943-55

GEORGE J. BALL, et al
Plaintiffs.

vs.

MURPHY AUTO PARTS CO., INC.,
Defendant.

Civil No. 4168-55

NOTICE OF APPEAL

Notice is hereby given this 28th day of September, 1956, that the MURPHY AUTO PARTS CO., INC., defendant in the above-entitled consolidated causes, Civil Actions Nos. 943-55 and 4168-55 hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 20th day of June, 1956 in favor of the plaintiff, THOMAS CHARLES BALL, etc. in Civil Action No. 943-55, and plaintiff, GEORGE J. BALL, et al. in C.A. No. 4168-55 against said MURPHY AUTO PARTS CO., INC.

/s/ R. Sidney Johnson
R. Sidney Johnson

/s/ Guy B. Hardy
Guy B. Hardy
Attorney for Defendant,
Murphy Auto Parts Co.

Copies to:—
Albert J. Ahern, Esq.
Attorney for Plaintiffs
National Press Bldg.
Albert F. Beasley, Esq.
Atty. for Deft. James B. Murphy
Investment Bldg.

343 Filed Oct 9 1956 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS CHARLES BALL, et al.,
Plaintiffs,
vs.
MURPHY AUTO PARTS CO., INC.,
Defendant.

Civil Action No. 943-55

GEORGE BALL, Sr., et al.,
Plaintiffs,
vs.
MURPHY AUTO PARTS CO., INC., et al.,
Defendants.

Civil Action No. 4168-55

STATEMENT OF POINTS ON APPEAL

The points to be presented by appellant (defendant), Murphy Auto Parts Co., Inc., on the appeal herein are:

The Court erred:

1. In admitting into evidence, as against the defendant, Murphy Auto Parts Co., Inc., the testimony of Mrs. Rita Ball as to declarations or admissions of the defendant, James B. Murphy, alleged to have been made to her at the scene following the accident, as evidence of the scope of the employment and authority of the said James B. Murphy at the time and place of the accident.

2. In denying the motion of said defendant to strike the aforesaid testimony of Mrs. Rita Ball.

3. In holding that the evidence for the plaintiffs was sufficient to take the case to the jury, as against said defendant, on the question of whether or not the defendant, James B. Murphy, was acting within the scope of his employment by said defendant, Murphy Auto Parts Co., Inc., at the time and place of the accident.

4. In denying said corporate defendant's motion for a directed verdict in its favor, made at the close of the plaintiffs' evidence upon the ground that plaintiffs had failed to establish, as a matter of law, that the defendant, James B. Murphy was acting within the scope of his employment by said corporate defendant at the time of the accident.

5. In denying the motion of the defendant, Murphy Auto Parts Co., Inc., for a directed verdict, made at the close of all of the evidence upon the ground that the evidence showed, as a matter of law, that the defendant, James B. Murphy, was not acting within the scope of his employment by said corporate defendant at the
344 time and place of the accident.

6. In granting plaintiffs' requested Instruction No. 19.

7. In denying requested Instruction No. 2, of the defendant, Murphy Auto Parts Co., Inc.

8. In denying the motion of the defendant, Murphy Auto Parts Co., Inc., for a new trial, or in the alternative, for judgment non obstante veredicto.

/s/ R. Sidney Johnson
R. Sidney Johnson

/s/ Guy B. Hardy
Guy B. Hardy
Attorneys for Defendant,
Murphy Auto Parts Co.,
Appellant.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Statement of Points on Appeal was mailed, postage prepaid, to Albert J. Ahern, Attorney for the plaintiffs, Investment Building, Washington D. C., this .... day of October, 1956.

.....

R. Sidney Johnson

Received copy 10-9-56
Albert J. Ahern Jr.

317 Filed Apr 17 1954 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS CHARLES BALL
through his next friend
RITA H. BALL,
Plaintiffs

vs.

JAMES B. MURPHY,
Defendant

Civil Action No. 5224-52

INTERROGATORIES TO BE ANSWERED BY THE DEFENDANT

1. How long have you worked for your father?
2. What is your father's full name?
3. What is his place of business?
4. What are your working hours?
5. What is your father's home address?
6. What is the full name of your mother?
7. Do you ever work nights?
8. If the answer to the question above is yes, what are the hours?

9. Was the car you were driving on the night of the accident owned by you?

10. Did your father contribute to any part of the payment for the automobile?

11. Do you receive any income or expenses for the use of your automobile in your business?

12. State in full what your duties consist of.

13. Have you received any promotions or raises in income since the date of the accident?

14. Have you transferred any property since this suit was filed?

15. Do you own your own home?

16. If the answer to the question above is yes, did your father assist you financially in the purchase of the home?

17. How many people are employed in your place of business?

318 18. Are you paid a salary?

19. Do you receive any commissions above salary?

20. Does your position entail any travelling?

/s/ Albert J. Ahern, Jr.
Albert J. Ahern, Jr.
National Press Building
Counsel for Plaintiff

POINTS AND AUTHORITIES IN SUPPORT OF WRITTEN INTERROGATORIES

See Rule 31 of the Rules of Federal Civil Procedure.

I certify that I have this 16th day of April, 1954, mailed copy of foregoing interrogatories to Albert F. Beasley, Esq., Investment Building, Washington, D. C., counsel for defendant.

/s/ Albert J. Ahern, Jr.
Albert J. Ahern, Jr.

319 Filed May 1 1954 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS CHARLES BALL
through his next friend
RITA H. BALL,
Plaintiffs,

vs.

JAMES B. MURPHY
Defendant.

Civil Action No. 5224-'52

ANSWER OF DEFENDANT TO INTERROGATORIES PROPOUNDED BY PLAINTIFFS

Interrogatories Nos. 1, 3 and 4:

I am not employed by my father, and have never been. I work for Murphy Auto Parts Co., Inc., which is engaged in the business denoted by the name of the company. My working hours are 8:00 A.M. to 5:00 P.M. Monday through Friday of each week and 8:00 A.M. to 1:00 P.M. on Saturday of each week.

Interrogatories Nos. 2 and 5:

When I speak of my "father," I generally mean my step-father, Milburn L. Murphy who resides at 19 Sunnyside Road, Silver Spring, Maryland. My real father's name is James Benjamin Hankins. My name was legally changed to James Benjamine Murphy by decree of the Circuit Court of Montgomery County, Maryland in equity No. 13577, dated June 24, 1948.

Interrogatory No. 6:

Florence Evelyn Lee (Hankins) Murphy.

Interrogatories Nos. 7 and 8:

Since December 1953 I have worked nights, irregularly. No hours are fixed.

Interrogatory No. 9:

The automobile was and is owned by me and my wife jointly.

Interrogatory No. 11:

For use in calling on customers during business hours, I receive an allowance or expense reimbursement that has been averaged out into a flat sum payable weekly in addition to salary.

Interrogatory No. 12:

In general, I manage the store, buying and selling and suprevising the work of other store employees. Our company does a wholesale and a retail business, and I call on customers in our wholesale business.

Interrogatory No. 17:

I have no place of business. The company by whom I am employed has eight (8) employees.

Interrogatory No. 20:

My employment entails some local travelling during business hours to call on customers, as indicated in answer to Interrogatory No. 12 above.

/s/ James B. Murphy
James B. Murphy

Subscribed and sworn to before me this 28th day of April 1954.

/s/ Ann McCann
Notary Public, D.C.

CERTIFICATE OF SERVICE

I hereby certify that I have, this 28th day of April 1954, served the aforegoing answers upon the plaintiffs by mailing a copy thereof, postage prepaid, to their attorney of record, Albert J. Ahern, Jr., National Press Building, Washington 4, D.C.

/s/ Albert F. Beasley
Albert F. Beasley
Investment Building
Washington 5, D.C.
Attorney for defendant

321 Filed Nov 2 1954 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THOMAS CHARLES BALL,
through his next friend
RITA H. BALL,
Plaintiffs,

vs.

JAMES B. MURPHY,
Defendant.

Civil Action No: 5224-52

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND COMPLAINT AND ADD MURPHY AUTO PARTS COMPANY, INC. AS A PARTY-DEFENDANT

Defendant James B. Murphy objects to the granting of plaintiffs' motion to amend his complaint and to add Murphy Auto Parts Company as a party-defendant, upon the ground that the answers to interrogatories and testimony on deposition do not establish any basis for liability

of such proposed additional party-defendant, and the addition of another defendant may be prejudicial to this defendant on the issues of liability.

This action arises out of a collision between defendant's automobile and the infant plaintiff about 6:00 P.M. on the 30th day of October 1952 at or near the intersection of Minnesota Ave. and B St., S.E., in the District of Columbia. The infant plaintiff ran out into the street and in front of defendant's automobile when the automobile was crossing the intersection, and was struck before defendant could bring the car to a stop. Defendant thus contends that the accident occurred without any negligence on his part and that there is no liability for the injuries sustained by the infant plaintiff.

In testimony on deposition, this defendant testified that he was employed as a counterman in Murphy Auto Parts Company, Takoma Park, Maryland (Tr. 2-3); that the car is owned by himself and his wife (Tr. 3); that he
322 was going home from work when the accident occurred (Tr. 3); and that he leaves work between 5:30 and 7:00 P.M. (Tr. 10). In answer to interrogatories served herein, defendant has stated under oath that his regular working hours are from 8:00 A.M. to 5:00 P.M., Monday through Friday of each week and 8:00 A.M. to 1:00 P.M. on Saturday of each week; that when he speaks of his "father" he generally means his stepfather; that since December 1953 he has worked nights irregularly without any fixed hours; that the automobile was and is owned by him and his wife jointly; that for use in calling on customers during business hours he receives an allowance or expense reimbursement that has been averaged out into a flat sum payable weekly in addition to salary; that in general he manages the store, buying and selling and supervising work of other employees; and that he calls on customers in their wholesale business during business hours. There is nothing else of record

on the point, and plaintiff has not made any showing of any additional facts, if any there be.

It is thus apparent that there was no agency of this defendant for the proposed additional defendant, that the proposed additional defendant has no interest in nor ownership of the automobile in question, and that there is no basis in fact or in law for claiming that the proposed additional defendant was liable for the operation of defendant's automobile at the time of the collision in question. This defendant has an interest in avoiding prejudice that is likely to result if plaintiff brings in a number of parties and the jury has an opportunity to gain the impression that any verdict rendered would be payable by several parties and hence not so great a burden on any one. As indicated, this defendant thinks there is no liability, but if this Honorable Court and a jury impaneled herein should decide any liability exists, such liability would rest upon him and upon him alone. He should have a fair and free opportunity for litigating the question of liability. Upon that ground he opposes the granting of the motion to add an additional defendant.

/s/ Albert F. Beasley
Albert F. Beasley
Investment Bldg.,
Washington 5, D.C.
Attorney for defendant

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 28th day of October 1954, served a copy of the aforegoing memorandum in opposition upon the plaintiffs by mailing a copy thereof, postage prepaid, to their attorney of record, Albert J. Ahern, Jr., Esquire, National Press Building, Washington 4, D.C.

/s/ Albert F. Beasley
Albert F. Beasley

PROCEEDINGS

* * * *

Thereupon

JAMES MURPHY

a witness called by counsel for the Plaintiffs, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. AHERN:

Q Now, will you state your name for the record? A James B. Murphy.

Q And where do you live? A 2725 Plyers Mill Road, Silver Spring, Maryland.

Q Did you live there in October of 1952? A I did not.

Q Where did you live in October of 1952? A 3107 G Street Southeast as far as I remember the address.

Q Now, sir, in October of 1952, where were you employed? A I was employed by the Murphy Auto Parts.

Q Now, the Murphy Auto Parts, which you say you were employed by—let me get at it this way. Is your foster father employed at Murphy Auto Parts? A He is the president of the corporation.

Q He is the president of the corporation. And what was your official function with the corporation? A I was employed as a counter man.

Q I know you were employed as a counter man. But did you have any other status? A I don't remember at that time.

Q Let me see if I can refresh your recollection. Were you also the secretary and treasurer of the Murphy Auto Parts? A I am at this time.

Q Were you in October of 1952? A I don't remember what time I was made secretary and treasurer.

Q Have you no recollection? A I do not.

Q Now, when did you come to work for Murphy Auto Parts, Inc.,? A While I was attending Maryland University I worked part time there and I believe I started working full time there, I don't remember whether it was January or June.

MR. BEASLEY: What year?

THE WITNESS: I said I don't remember whether it was January or June.

MR. BEASLEY: Of what year?

THE WITNESS: Of 1952.

BY MR. AHERN:

Q What other members of the family are employed there? A My mother, Mrs. Murphy.

Q Now, when you say that you were a counterman, what do you mean by that? A I take orders over the phone, write them down and give them to a delivery boy for delivery.

Q Do you do any traveling? A Not in my job, no, sir.

Q Did you call on customers in 1952? A Not in 1952, no, sir.

Q Not in what? A Not in 1952, no, sir.

Q When did you first begin to call on customers? A At a later date.

Q When? A I have been to customers' establishments to straighten out different items.

Q When did that first begin? A After the manager, Mr. Rush left.

Q Do you recall that after this case was filed that I propounded certain interrogatories to you? Do you remember that? A Yes, sir.

Q Do you recall that in response to one of these interrogatories—and, Mr. Beasley, for your benefit, I am now reading from Answer No. 12.

MR. BEASLEY: Let us have the interrogatory first, if I may suggest, Mr. Ahern. I have my copy right here if you don't have yours handy.

MR. AHERN: Thank you very much, Mr. Beasley.

BY MR. AHERN:

Q "State in full what your duties consist of." And then you answered in Interrogatory No. 12.

"Generally I manage the store, buying and selling and supervise the work of other store employees. Our company does a wholesale and retail business and I call on customers in our wholesale business."

MR. BEASLEY: Now, would you also give the date of that answer?

MR. AHERN: I think, your Honor, that if Mr. Beasley wants to in any way impeach the validity of these answers, he should do this on cross.

MR. BEASLEY: I was just trying to be helpful, if the Court please.

MR. AHERN: I will say for the record that the interrogatories were answered, the interrogatories were propounded on the 16th day of April, 1954.

BY MR. AHERN:

Q Then in response to Interrogatory Eleven you were asked this question:

"Q Do you receive any income or expenses for the use of your auto in your business?"

And in response to that interrogatory, you said:

7 "A For use in calling on customers during business hours I receive an allowance or expense reimbursement that has been averaged out into a flat sum payable weekly in salary."

Now, I will ask you first, were you given those interrogatories and did you make those answers? A In 1954 I did.

Q All right. In response to Interrogatory No. 11, were you given, in 1952, did you receive from Murphy Auto Parts, Inc., an annual sum of $10 a month for the use of your automobile? A I believe I did. I am not sure on that point.

Q Well, now, Mr. Murphy, haven't you looked up the financial records since this suit began to see whether you

have received the amount of $10 for your automobile? A My answer is I do not remember.

Q My question is have you looked up the financial records to see if each week you received $10? A I did not look them up personally, no.

Q Did someone in your behalf? A Yes, sir.

Q Who was that? A Probably Mrs. Murphy.

Q Now, in 1952, then you were just working behind the counter, is that right? A That is correct.

Q You did not call on customers? A That is correct.

Q And you thought, when I was propounding these interrogatories, I was asking about your occupation in 1954 and I was not concerned about 1952?

MR. BEASLEY: The witness speaks for himself.

THE WITNESS: You did not make that clear when the questions were asked.

BY MR. AHERN:

Q Therefore, you were under the impression at that time that I was concerned about your occupation in April of 1954 and not in October of 1952? A You did not specify and I gave my position as of that time.

Q All right. Now, so, in October of 1952 then, Mr. Murphy, will you tell his Honor and the members of the jury, No. 1, what do you say your work hours were? A From 8 in the morning until 5 p.m. in the afternoon.

Q And I believe you said you worked as a counterman so you worked behind the counter, is that it? A That is correct.

Q And what was your salary? A I don't remember at that time.

Q Well, haven't you looked it up since? A I don't remember what my salary was, sir.

Q Didn't you know you were going to be asked about that at this trial?

MR. BEASLEY: There is an implication here. May we come to the Bench?

(At the Bench.)

MR. BEASLEY: There is an implication here that this defendant is concerned with this accident. He is not. I think that counsel should not be allowed to leave the impression with the jury that it was an obligation of James B. Murphy, the driver, to check these matters, and so on. Only the corporate defendant is concerned with these matters and that is all that this has got anything to do with.

THE COURT: Very well.

(In open court.)

BY MR. AHERN:

Q Now, Mr. Murphy, when you worked behind the counter in 1952, I gather from that you mean when a person came into the store, you were in the store for your eight hours, is that it? A That is right.

Q You never ventured out of that store in 1952 to visit any of the customers of Murphy Auto Parts, Inc.? A I do not remember because that was not part of my duty.

Q You would remember if you did? A No, sir, because that is not a part of my duty and I think if I had done it, I would remember.

Q So, my statement is that if you had done it, you would remember? A That is correct.

Q And you did not call, in October of 1952, you had no occasion to visit Takoma Motors, did you? A Not that I remember.

Q And you had no occasion to visit Old Colony Laundry? A Not that I recall.

Q Those individuals would not know you and would not have seen you in 1952? A If they had come in the store, they would recognize me.

Q But if they didn't come to the store and all their business was through delivery by Murphy Auto Parts, Inc. they would not know you in 1952, would they? A That could be true.

Q What could be true? A I have some personal friends in Takoma Park.

Q Now, do you know where the Shelton and Golden Station is? A No, sir, that name doesn't register.

Q How about Takoma Shell? A I know where it is, yes, sir.

Q Now, how about the people there, customers there, didn't they see you in 1952? A They could have, yes, sir.

Q What were you doing when you were at Takoma Shell? A I didn't say I was at Takoma Shell. They could have seen me in the store.

Q Did you visit Takoma Shell in 1952?

MR. JOHNSON: Your Honor, I object to this line of questioning. 1952 is 12 whole months. I can't see how just any old time in that year. He might have called on somebody and I cannot see how that would affect this case.

THE COURT: I think you are right. I think that the issue here is what he was doing at the time of the accident.

MR. AHERN: I will narrow it down to October, and Narrow it to October, 1952?

BY MR. AHERN:

Q Now, suppose we get at it this way: When you were working behind the counter as you say you were in October of 1952, if one of your customers came in and bought an article at Murphy Auto Parts, Inc., you would make out a sales slip, would you not? A That is correct.

Q I want you to tell his Honor and members of the jury and I will confine it to October 1952, who were the people that were employed in the store on October, 1952? A There was Mr. Rush, myself, and I do not remember who was employed in the office at that time.

Q Mr. Rush? A Mr. Wreche.

MR. BEASLEY: Can you spell it?

THE WITNESS: W-r-e-c-h-e.

BY MR. AHERN:

Q And who else? A Just myself and I do not remember who was employed in the office at that time.

Q And yourself. Now, if there were to be deliveries in 1952, then who made the deliveries? A The delivery boys.

Q And how many trucks did you have? A Two at that time, I believe.

Q Now, could you be mistaken about that? A I don't think so, no, sir.

Q And now, let me ask you this: Did Mr. Wreche receive $10 a week for the use of his car?

THE COURT: Did he receive $10 in October, 1952 for the use of his car?

THE WITNESS: I received an amount, I don't remember what.

THE COURT: What was it for?

THE WITNESS: At that time it was a continuation. I went to Maryland University and my salary was small and it was a continuation when I was going to school to help defray expenses of going to school.

THE COURT: It wasn't for the use of your car?

THE WITNESS: Not at that time.

THE COURT: October, 1952?

THE WITNESS: That is right.

BY MR. AHERN:

Q Well, now, let's get at that, Mr. Murphy.

In October of 1952 and you have produced the financial records here—

MR. AHERN: Your Honor, may I, at this point, it might be good if—

MR. BEASLEY: Mr. Ahern, didn't you ask the corporate defendant?

MR. AHERN: All right. I call upon the corporate defendant to produce the financial records, showing his earnings in October of 1952.

MR. JOHNSON: We have them.

MR. BEASLEY: Your Honor, would I be out of order to suggest that, if you were going to take a midmorning recess—

MR. AHERN: May we have a recess at this time?

THE COURT: Very well.

(A brief recess was taken.)

BY MR. AHERN:

Q Do you recall in response to the last question asked by His Honor that you stated you were not getting a car allowance of $10 a week in 1952? Do you recall that question asked by the Court and your answer that you did not get it? A I did not say I did not get it.

Q What did you say? A I said I don't remember the sum.

Q He asked you about a car allowance and you said it was an allowance to help you attend the university. A It was listed as a car allowance.

THE COURT: Was it a car?

THE WITNESS: At that time it was a continuation for the university expense.

THE COURT: How was it listed on the books?

THE WITNESS: I believe it was listed as a car allowance.

THE COURT: Why?

THE WITNESS: It was a continuation.

THE COURT: Continuation of what?

THE WITNESS: When I was going to the university, I got a small salary. It was listed then to help defray my expenses.

THE COURT: And it was not for that at all, than?

THE WITNESS: Well, I don't know.

THE COURT: Well, was it?

THE WITNESS: It was to defray my expenses for going to school.

THE COURT: But it was put on the books as a car allowance?

THE WITNESS: I used my car.

15 THE COURT: Was it put on the books as a car allowance?

THE WITNESS: Yes.

THE COURT: What was the purpose of putting it on the books as a car allowance?

THE WITNESS: That purpose, I don't know.

BY MR. AHERN:

Q Do you know that a deduction was taken for it? A What kind of a deduction?

Q A business deduction? A That part of the accounting, I do not know, sir.

Q Let me show you this book for October of 1952. Now you will notice that James B. Murphy—I will start here with September and run it right through. James B. Murphy, car allowance, $10.

MR. BEASLEY: What is that date?

MR. AHERN: I am reading from the date.

THE WITNESS: September.

MR. AHERN: September 13, Car Allowance, $10.

Now you will notice in that week of September 13 nobody else gets a car allowance.

Shop Labor, M. L. Murphy. Mr. Murphy doesn't get one but this Ted Wreche also gets a car allowance. Was that the individual who worked with you?

THE WITNESS: He worked in the store, yes.

16 BY MR. AHERN:

Q What was his function? A He was a counterman, also.

Q What did he get the car allowance for? A That I do not know.

Q He made deliveries? A Not that I know.

Q All right.

Following down to September, the week of September 20—let me get a pad, I will trace this thing.

MR. BEASLEY: Would that ruler help?

MR. AHERN: Yes, sir. Thank you, Mr. Beasley.

BY MR. AHERN:

Q The week of September 20 you received a car allowance of $10, didn't you? A It is there on the book, yes, sir.

Q Well, you received it, didn't you? A I don't remember that far back.

Q Who keeps these books? A We have an auditor.

Q And you supply—do you, yourselves supply the information to the auditor of who supplies this information? A It is taken off the pay roll checks.

MR. BEASLEY: Mr. Murphy, you are falling into an error because Mr. Ahern is close to you and you are not speaking loud enough.

17 BY MR. AHERN:

Q Now, let's come down to the week of September 27. Now on the week of the 27th, I will read off the following employees and you tell me what two employees of that date received a car allowance.

M. L. Murphy, Ted Wreche, Pete Bealty, Pat Held, J. B. Murphy, which is yourself, Jack Showman. Now, will you look down through that list and tell me which two received a car allowance? A I know I received a car allowance.

Q What other individual? A Well, if you will allow me, I will check.

Q Certainly. A We have one listed here for Mr. Murphy.

Q All right. Now let us come down to the week of October 4, week of October 4 and out of your list of employees who received the $10 car allowance? A Right here, Mr. Wreche.

Q And who else? A And myself.

Q Now, in all the weeks that I have gone through so far up to October 4 and then we will continue to the 18th. Do you notice any of the entries for a car allow-

ance for Mr. Milburn Murphy, the president? A I did not notice any then.

Q Is it your testimony that Mr. Milburn Murphy called on these customers? A I made no statement.

Q Is that your testimony that in October of 1952 the president of the company was running around calling on customers? A He could have.

Q Well, did he or didn't he? A I don't know. I mean I don't know his function at that time. I don't remember if he was calling on customers.

Q Let's come to the week of October 11. Will you look down through the list of employees on October 11 and tell me what employees of Murphy Auto Parts, Inc., received $10 allowance for their car? A Mr. Wreche and myself.

Q And now, let's look for the week of October 18 which is the week now in question and will you trace that down and tell us who received car allowance in the week of October 18, 1952? A Mr. Wreche and myself and Mr. Furman.

Q All right. Now, what was Mr. Furman's job? A I believe he was a salesman.

Q And what did he get the $10 for? A For use in the business.

Q Of his personal automobile? A Whether it was personal or not, I don't know.

Q Well, it was registered in his name, wasn't it? A That I couldn't tell you, sir.

Q Mr. Wreche, you say, was working behind the counter with you? A That is correct.

Q And how long did you, let me ask you this—how long did you work with Mr. Wreche? A I don't remember that. I imagine it was about a year, a year or two years.

Q And you knew him for sometime, did you not? A Yes, sir.

Q You were fairly close personal friends? A Yes, sir.

Q And he is subpoenaed here, he is a witness in this case? A I don't know.

Q He is going to be a witness in this case? A That I do not know, sir.

Q Let me ask you this. Did you ever ask Wreche what he was getting his $10 car allowance for? A No, sir.

Q Now, when you were asked in Interrogatory No. 7, you were asked this question:

"How many people are employed in your place of business?"

You answered: "I have no place of business. The company by whom I am employed has eight employees."

And then when you were asked in Interrogatory No. 20: "Does your position entail any traveling?"

You answered: "My employment entails some local traveling during business hours to call on customers as indicated in answer to Interrogatory No. 12."

Now, when you answered those interrogatories, is it your testimony that you had in mind I was inquiring about April of 1954 and not October of 1952? A That is correct.

Q When did this car allowance that you were getting in October of 1952, when did you decide in your mind that that was being given to you because you were calling on customers?

MR. BEASLEY: I object.

THE COURT: Did there come a time when you received a car allowance to call on customers?

THE WITNESS: Not to call on customers. I continued receiving a so-called car allowance.

BY MR. AHERN:

Q Then, according to your testimony this $10 you received as a car allowance was not to call on customers.

How far did you live from your place of work? A Ten miles.

21 Q About ten miles. What kind of a car were you driving? A Then a 1950 Plymouth.

Q That was registered in your name and your wife's name? A That is correct, 1952.

Q I suppose when you would fill the tank up with gas, fill it up with oil, that would probably run you about $5 or $6 at the most? A Well, I couldn't say.

Q You know what it is to fill up a tank of gas in your car? A That is right.

Q What would that come to as a general rule? A One tank of gas and oil might come to $5.00.

Q And that was just for the use, according to your testimony now, you drove to work. You parked your car, then you stayed behind the counter for your eight hours, is that correct? A That is correct.

Q And then you drove your car home? A That is correct.

Q And a tank of gas would last you a week, would it not? A That I don't know. I couldn't say. It all depends on what personal business I had after hours.

Q Well, of course. Personal business after hours.

22 But let me put it this way: You didn't use $10 a week in gas, did you? A And in repairs, I might, yes, sir.

Q For a prolonged period? A That is right.

Q Is that your testimony? A That I might use $10 for repairs and gas and oil over a long period.

Q I am not asking you whether you might. Did you? A That I couldn't say. I didn't keep records of it.

Q Now, according to your testimony that you worked behind a counter during this period whenever a sale was made, you would make a sales slip, would you not? A That is correct.

MR. AHERN: Now, your Honor, I am referring to and, your Honor, so the record may be preserved, may

I merely have them marked as, what for the Plaintiff, Mr. Clerk?

DEPUTY CLERK: No. 3.

MR. AHERN: Plaintiff's No. 3, this book of account in so far as it relates to September and October, 1952.

DEPUTY CLERK: Plaintiffs' Exhibit No. 3 for identification.

(Account book was marked for identification Plaintiffs' Exhibit No. 3.)

MR. AHERN: Yes, and may I have marked with the next number, Plaintiffs' No. 4, this group of sales slips?

23 DEPUTY CLERK: Plaintiffs' Exhibit No. 4 for identification.

(A group of sales slips is marked Plaintiffs' Exhibit No. 4 for identification.

BY MR. AHERN:

Q Yes. Now, I will show you first, Plaintiffs' No. 4 for identification, and I will ask you if you can identify what I am handing you? A Yes, sir, I can identify it.

Q Now, will you tell his Honor and the jury what that is? A That is a sales slip for parts, automotive parts.

Q Made at your headquarters? A That is correct.

Q And I don't know whether I elicited that—where are your headquarters? A 313 Cedar Street, Takoma Park, D.C.

Q While you were working behind this counter during this period, whenever a sale would be made, one of these sales slips would be made up reporting the sale, is that true? A That is correct.

Q And when the salesman would make up the form, and I am now referring to sales slip No. 7783 which is part of Defendants—Plaintiffs' Exhibit No. 4, you would make out under "Sold To," you would name the

24 purchaser. You would indicate whether it was a cash sale. You would itemize the objects sold.

And then the salesman would initial the sheet. Isn't that right? A Sometimes, yes.

It would be marked as to whether it was paid or signed if it was a charge.

Q And the particular salesman would initial it? A Sometimes, yes.

Q Now, I will go through this list on October 20, 1952, and I want you to name for me any initials you can identify and in particular I want you to pick out any sales slips signed by you on October 20, 1952.

First I will hand you 7783 and ask you if you can identify any signature thereon. A That is my own.

Q That is your own? A Yes, sir.

Q Now, I will hand you 8185. A I am unable to decipher—

Q Now this 7783, where are your initials on that sheet? A Right there.

Q What is your name? A James.

Q James Murphy? A That is "J."

Q Is that a ~~"J.M."~~? A That is just "J." That could be mine. I wouldn't say I didn't—

THE COURT: Will you speak up?

THE WITNESS: I say this one could be mine.

BY MR. AHERN:

Q Now, 7782. A That is Mr. Wreche's.

Q Mr. Wreche signed his name at the bottom? A No, that is a signature by a gentleman from Armstrong Motors. That is a charge sale.

Q Where is Mr. Wreche's signature? A There, that is Mr. Milburn Murphy's.

Q 7776, Wreche? A Yes.

Q 7778 Wreche? A Yes, sir.

Q 7792? A Wreche.

Q 7793, Wreche? A Right.

Q 8188, Wreche? A Right.

Q 8177, Mr. Murphy? A That would be Mr. Murphy's.

Q 7795, Wreche? A Right.

Q 8365, whose initials are those? A That would be mine.

Q Where is your initial? A It does not appear.

Q How do you know that is yours? A By the handwriting.

Q Doesn't the customer make out the handwriting? A He does not.

Q All right.

Let's put these two aside.

7786. That would be Mr. Wreche, I would imagine.

Q Yes. 7774. A Mr. Wreche.

Q 7769. A That would be mine.

Q Where is your initial? A It does not appear.

Q All right. 8187. A That would be Mr. Wreche.

Q 8178. A That would be mine.

Q No initials? A No initials.

27 Q Blank sheet? A No, it is not a blank sheet.

Q Other than the writing. No indication as to who made the sale? A That is correct.

Q So you are identifying that by what? A By the handwriting.

Q By the handwriting, and indicating the object sold? A Yes, sir.

THE COURT: Your handwriting?

THE WITNESS: That is right.

BY MR. AHERN:

Q 8181? A That is mine with my initial.

Q Why was it you initialed some and not others? A That is just a force of habit. It isn't required to initial—

Q 8182? A That is my handwriting up here. I don't recognize the initial. But that is my handwriting on that ticket.

Q You mean as to the objects sold. A As to the Hicks Texaco and to the objects sold, yes, sir.

Q 8184. A That would be mine, also.

28 MR. BEASLEY: Aren't you putting his in a separate group?

MR. AHERN: That is what I am doing.

MR. BEASLEY: The last one you left out.

BY MR. AHERN:

Q 8186. A That is mine.

Q 8189. A That, also.

Q No initial? A No initial.

Q 8190. A Mr. Wreche.

Q 8191? A Mr. Wreche.

Q 8193 and 8194. A Mr. Wreche.

Q 8195? A Mr. Wreche.

Q 8174. A Mr. Wreche, I believe.

Q 8172. Mr. Wreche.

Q 7765. A Mr. Wreche, I imagine. I mean,

29 that is not my handwriting.

Q 7766. A That is Mr. Wreche.

Q 7767. A Also his.

Q 7768. A Mine.

Q No initial. A No initial.

Q 7770. A Mr. Wreche.

Q 7771. A Mr. Wreche.

Q 7773. A Also his.

Q 7775. A Also his.

MR. BEASLEY: We can hardly hear you, Mr. Murphy.

BY MR. AHERN:

Q 7777 A Mr. Wreche.

Q 7778. A Well, Mr. Wreche.

Q 7779. A Mr. Wreche. That is my—looks like my writing at the top of the ticket but it is his initial,

30 he has initialed it. But that is my writing in here. I may have made out the ticket and he may have received the money.

Q Well, we will put that in your pile.

7780. A That is mine.

Q No initial? A No initial.

Q 7782? A Mr. Wreche.
Q 7787. A Mr. Wreche.
Q 7788. A That is mine.
Q Is that a "J.M."? A This is a "J."
Q And that is your initial? A Yes.
Q You made that? A I did. I also made that.
Q 7779? A Yes.
Q 7791? A Mr. Wreche.
Q 7794. A Mr. Wreche.
31 Q 7784? A I believe that was Mr. Wreche, although Mr. Furman might have made it.
Q 8605. A Mr. Wreche.
Q 8606. A Mr. Wreche.
Q 8200. A Mr. Wreche.
Q 8198. A Mr. Murphy.
Q 8197. A Mr. Wreche.
Q 8196. A Mr. Wreche.
Q 7796. A Mr. Murphy.
Q 7797. A Mr. Wreche.
Q 7798. A Mr. Wreche.
Q 8183. A That is my handwriting, that would be mine.

Q All right. Now on October 20, then, you would say that these slips that I am holding in my right hand, are sales by Mr. Wreche, and represent sales over the
32 counter? A That is Mr. Murphy and Mr. Wreche.
Q Mr. Murphy and Mr. Wreche, that represents sales over the counter? A Yes, sir.
Q Sales in which Mr. Wreche was not obligated to leave the store? A Well, now that—some of those, if they are signed, marked "Paid" by him, he could have made the ticket, they could have gone out on delivery and come back by the delivery boy.
Q All right. Now, let's explore this a moment. If the sales slip, let us take the sales that you say you made, now, will you look at these slips that I have extracted from that pile that you say you made.

First of all, take out the ones that actually bear your signature. Which are the ones that have your signature?

(The witness handed a pile of papers to counsel.)

BY MR. AHERN:

Q Now, as to these 1, 2, 3, 4, 5, slips, that bear your signature, will you look at those and tell me if you can tell from the slips what ones were paid by cash right at the shop and which ones you delivered and were paid at the place of delivery.

MR. BEASLEY: By "you delivered" you mean him personally?

MR. AHERN: Well, anyone made a delivery.

33 Let's put it that way.

THE WITNESS: Usually if they were marked "paid" by me, it would be over-the-counter business. These, as far as I can tell, would be deliveries.

BY MR. AHERN:

Q Which ones? A This would be.

Q All right. Is this the pile that you sold that you are saying were deliveries? A That is correct.

Q Now, then, let us take these up. This sale here that bears slip 8365, which was a sale to the Old Colony Laundry, where is that Old Colony Laundry located? A Blair Road.

Q Now, they were sold, what is that that was sold? A That would be brake lining.

Q Is that your writing? A That is correct.

Q They were sold brake lining for $3.49. Who made that delivery? A Mr. Brown probably picked it up in the store.

Q Do you have an independent recollection of that? A No, sir.

Q Who is Mr. Brown? A He runs the garage at the Old Colony Laundry.

Q Then is it your statement that Mr. Brown

34 came to Murphy Auto Parts and picked up the part? A By indication there, it would be.

Q What is there on that slip there that indicates that? A Mr. Brown signed it and he usually came over and picked up his stuff.

Q Deliveries were made to Mr. Brown from time to time? A That is correct.

Q Is there anything on this slip by which anybody who does not work in Murphy Auto Parts, Inc., and doesn't handle their books can tell whether that object was delivered to the Old Colony Laundry? A No, sir.

Q All right. Well, sales slip No. 7769. Strike that. I assume, Mrs. Witness, when you selected these slips of paper in response to my request, that these slips of paper indicated to you that there was delivery made, is that correct? A No, sir.

Q What did you single these papers out for? What do they represent?

MR. BEASLEY: You asked him to separate the ones with his initial from those without it.

MR. AHERN: My request to the witness after I did that, was to hand to me any papers signed by him which he could indicate or identify from the paper were physically delivered to the particular customer.

BY MR. AHERN:

Q Now is that what you have done? A I don't believe that is the question at all, sir.

Q Will you look at the slips and select from the ones that you sold, first of all, from the ones that you sold, select the ones that on the slips indicate to you that there was a delivery to the particular customer. A The only way I could do that is judge by distance. If the people were close enough, they usually picked it up, picked up the items.

There is nothing here to tell me, I mean to tell anyone else whether it was delivered or the item was picked up, other than a signature.

Q That is what I want to get. A You have to be familiar with the area in order to—

Q That is what I want to get at. In other words, there is nothing on those sales slips that someone not associated with Murphy Auto Parts, Inc., could tell whether the objects were delivered or bought at the Murphy Auto Parts, Inc.? A I can tell, yes, some of them I can. Now that was delivered.

Q 8178 you say was delivered to Holmes Oil Company? A That is correct.

36 Q Who was the proprietor there? A I couldn't tell you.

Q Who delivered that product? A I couldn't tell you. It would be either one of the two delivery boys listed on the book.

Q Who were the two delivery boys listed on the book? A I don't remember their names.

Q Look on the week of October 20 and pick the two delivery boys out for me. A Well, let's see. October 20.

Q Week of the 18th. A C. Sincox and P. Millison.

Q Now, let me ask you this: What—and you have testified on direct already—what trucks did Murphy Auto Parts, Inc., have? A I believe we had two.

Q You could not be mistaken about that, could you? A I don't think so.

Q Now, is there any indication—does Sincox still work for you? A No, sir.

Q Is he available? A No, sir.

Q Do you know his whereabouts? A No, sir.

37 Q How about Millison, is he available? A No, sir.

Q Do you know his address? A No, sir.

Q Well, let's pass on to the next slip then. A All of those would show signs of being paid by someone other than myself even though the tickets may be made out by myself. So I would imagine they were delivered.

Q Now, I am going to ask you this. Do you have an independent recollection that you can tell his Honor and

the members of the jury what you did on October 20, 1952? A In what capacity?

Q What you did during your work day on October 20, 1952? A As far as I remember, just answered the phone, put up stock. I don't remember any individual thing four years ago that I did on that particular day.

Q Of course this case has highlighted October 20, has it not? A That is correct.

Q Do you have any recollection of any deliveries that you would have made? A No, sir.

Q Or any customers you would have called on? A No, sir, it wasn't part of my job and I didn't do it to the best of my recollection.

38 Q Now, tell his Honor and the members of the jury when it first was then that you were directed to call on customers. A I was never directed.

Q When did you first, as part of your job, begin to call customers? A I visited customers after Mr. Wreche left.

Q And when did Mr. Wreche leave? A It was some year or six months, about a year after the accident.

Q And then you more or less continually visited customers? A No, I did not.

Q Who told you when to start calling on customers? A I took over the position as manager of the store and if any complaints arose that the delivery boys could not handle, then I handled them myself.

Q Now, let me ask you this, sir, coming back again to your testimony as to October 20, 1952, you received, did you not, in addition to your $10 a week, you received a salary on the books of the company of $50 a week, is that right? A If that is the amount, yes, sir.

Q Did you receive anything in excess of what is indicated on those books? A Yes, sir, I received—

39 oh, you mean other than indicated on the books?

Q Yes. A No, sir, I did not.

Q In other words, you received $50 a week plus this $10 a week you got for your car? A That is correct.

Q Now this $50 a week which you received when you were working behind the counter, you had regular hours then, I take it? A That is correct.

Q What were your hours? A 8 to 5.

Q And then you left at 5 and went home? A That is correct.

Q Was your $50 a week a flat salary or on an hourly basis? A That I do not know.

Q Did you ever figure it out to what it is an hour? A I imagine it could be figured as to what it is an hour.

Q Have you ever figured it out? A No.

Q You worked a forty-hour week, did you? A No, sir, we worked a half day on Saturday.

40 Q What did you work, 44 hours? A 44 hours. I believe we worked until one o'clock, so actually that would be 45 hours.

Q Well, I think, Mr. Murphy, that figures out to about $1.12 an hour.

MR. BEASLEY: What are you dividing it into? The fifty or sixty?

MR. AHERN: Into the 50.

BY MR. AHERN:

Q That figures out to about $1.12 an hour. How long did it take you to leave your shop and get to your home? A Depending on traffic conditions, a little over an hour.

THE COURT: To drive ten miles?

THE WITNESS: Yes, sir, through traffic, at five o'clock in the evening.

THE COURT: Took an hour?

THE WITNESS: Yes, sir.

BY MR. AHERN:

Q Well, let's give you two hours that you go back and forth the ten miles. And you received what, $10 a week, was it? That would be $5——

THE COURT: You didn't get the $10 to defray your expenses from your office to the house?

THE WITNESS: It was just a continuation. It wasn't just——

41 THE COURT: Continuation of what?

THE WITNESS: From the expenses.

THE COURT: What expenses?

THE WITNESS: When I was going to school.

THE COURT: Then you were not being paid $10 a week for expenses incurred by you in driving from your house to the shop and back?

THE WITNESS: Not specifically, no, sir.

THE COURT: You have got to answer my question. I do not want that kind of answer. Don't say "not specifically," just answer the question.

THE WITNESS: I was paid a sum of $10.

THE COURT: But not for transportation from your home to the plant and back again?

THE WITNESS: It could be used for that, yes, sir. I used it for that.

THE COURT: Were you paid by the company?

THE WITNESS: Yes, sir.

THE COURT: $10 a week?

THE WITNESS: Yes, sir.

THE COURT: To defray your expenses between your house and the plant and back again?

THE WITNESS: Well, that was when I was going to school at the other——

THE COURT: On October 20 were you going to school?

42 THE WITNESS: No, sir.

THE COURT: In that week did you get $10?

THE WITNESS: Yes, sir.

THE COURT: Was that $10 given you as an automobile allowance to defray your expense in driving your automobile from your house to the plant and back again?

THE WITNESS: It was listed as such.

THE COURT: Was that what it was for?

THE WITNESS: I don't know what it was for.

THE COURT: You weren't going to school?

THE WITNESS: No, sir.

THE COURT: Then what was the $10 for?

THE WITNESS: I was receiving a small salary and that was to defray the expenses of my automobile. Not particularly going to and from.

THE COURT: Was it included in it?

THE WITNESS: It could be.

THE COURT: Not "it could be," don't you know the terms of your employment?

THE WITNESS: Terms of my employment?

THE COURT: Yes, sir.

THE WITNESS: I don't know quite what you mean.

THE COURT: You don't know what I mean?

THE WITNESS: No, the terms of my employment.

THE COURT: You don't understand that?

43 THE WITNESS: I am employed from eight to five. I have certain duties.

THE COURT: Do you know what your compensation was for your employment?

THE WITNESS: Yes, sir.

THE COURT: $50 a week?

THE WITNESS: That is correct.

THE COURT: $10 for expense account for your automobile?

THE WITNESS: Yes, sir.

THE COURT: Was there included in that expense account for your automobile, expenditure incurred by you in driving from your home to the plant and back again?

THE WITNESS: I used it for that, yes, sir.

THE COURT: Was that what it was for?

THE WITNESS: I don't believe it was for that at that time, no.

THE COURT: What was it for?

THE WITNESS: Like I say, it was just a continuation.

THE COURT: You are not going to school in October?

THE WITNESS: No, sir.

THE COURT: So, let's forget about the continuation. What was the $10 a week paid to you for?

THE WITNESS: Well, it was listed as a car allowance.

THE COURT: Was that what it was used for?

THE WITNESS: I used it for that.

44 THE COURT: Was it used in defraying your expenses in leaving your home and coming to the plant and back again?

THE WITNESS: Yes, sir.

BY MR. AHERN:

Q We will pass to another subject, Mr. Murphy.

MR. AHERN: Would your Honor indulge me a moment? I am going to pass just to the merits of the accident, itself. Does your Honor want me to start now?

THE COURT: Yes, sir. We will recess at 12:30.

BY MR. AHERN:

Q Now, Mr. Murphy, directing your attention to this vicinity here as depicted on this map, you recognize that, do you not, as the area around Minnesota, B and 36th Streets? A Yes, sir.

Q On October 20, 1952 did you have occasion to be in this area? A Yes, sir.

Q And what was the occasion for your being in that area? A I was going home.

Q You were going home from where? A From Murphy Auto Parts.

Q To where? A To 3107 G Street.

THE COURT: That is where you lived?

THE WITNESS: That is correct.

45 Q Now, did you have any other function that you were performing? A No, sir.

Q When you got to the area here, about what time of the day or night was it? A Approximately six o'clock.

Q And what direction were you traveling in? A Would this be south, going down?

Q That is correct. A Then I would be traveling south.

Q Now, were you—will you come down and step to the map and take a pencil?

* * * *

62 Q Now, referring to the day of this accident, Mr. Murphy, did you have occasion to leave the company's store in Takoma Park at any time during that day on any business for the company? A No, sir.

Q What time did you quit work that day? A Five o'clock, sir.

Q And this automobile that you were driving, was that parked at the shop or the store or near there? A Yes, sir, behind the store.

Q Who owns that automobile? A My wife and I jointly.

Q Now, we are speaking about October 20, 1952? A Yes, sir.

Q You and your wife owned the car jointly? A Yes, sir.

Q And I think you have already been asked this but I will ask you again: Was there any business, or anything that you had to do in connection with the business of your duties as a counterman in the store after you left and got into the car and started home?

MR. AHERN: Of course that has been asked and answered.

THE COURT: Well, that is all right. He can answer.

63 THE WITNESS: No, sir, I had no other business except to go home.

BY MR. JOHNSON:

Q When were you due back at work again? A Eight o'clock the next morning.

MR. JOHNSON: That is all.

* * * *

66 Q Did you see Mrs. Ball there? A I did not.

Q You didn't see Mrs. Ball? A I didn't know Mrs. Ball and I couldn't—she wasn't there The woman

distinguished as the boy's mother came in sometime after the boy had been taken into the doctor's office.

Q Did you have a conversation with her at that time? A I did not.

Q You did not tell that you were in a hurry to get home and yoh had a customer to call on? A I did not.

MR. BEASLEY: Let him finish.

BY MR. AHERN:

Q Had you finished? A The first time I expressed my regret for the accident was the day in your office when the deposition was taken.

Q And you did not express your regrets that night? A Mrs. Ball was in such a hysterical—

67 Q Just answer the question. Did you or did you not express your regrets? A I did not. Not to Mrs. Ball.

* * * *

MILBURN MURPHY

68 was called as a witness by counsel for the Plaintiffs and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. AHERN:

Q Will you state your full name? A Milburn L. Murphy.

Q Where do you live? A 19 Sunnyside Road, Silver Spring.

Q Are you associated with Murphy Auto Parts, Inc.? A Yes, sir.

Q What is your position? A I am a salesman.

Q Well, what other status do you hold? A I am president of Murphy Auto Parts.

Q I gather you are not a counterman? A No.

Q And you are the foster father of the defendant here James B. Murphy? A That is correct.

Q Is your wife an employee of Murphy Auto Parts, Inc? A She works there, but she is not on the pay roll.

Q Is she listed on the pay roll as far as your books are concerned? A No, sir.

Q No payments are made to Mrs. Murphy, is
69 that right? A No, sir.

Q Is her name Florence Murphy? A Florence Murphy.

THE COURT: Who owns the stock?

THE WITNESS: I own the majority of it.

THE COURT: How much?

THE WITNESS: Well, I would say 90 per cent of it.

THE COURT:- Who owns the other ten?

THE WITNESS: James owns, I believe, five shares.

THE COURT: Who owns the other?

THE WITNESS: And Mrs. Murphy owns, I think, five shares.

BY MR. AHERN:

Q Now, let me ask you this, first of all, Mr. Murphy: What is the official title of your son? A He is Secretary and Treasurer.

Q Now, by treasurer, does he keep these books? Who keeps the books or who makes the entries in the book I am holding here, Plaintiff's No. 3? A We have an auditor to make those entries.

Q Your auditor makes these entries based on information that you transmit to your auditor, is that right? A Yes, sir.

Q Let me just ask you this question here about the week of October 18. I notice the initial there, "F. Murphy," who does that stand for? A Florence, my wife.
70

Q Will you tell me what that entry indicates? A I believe in 1952, correcting my statement, Mrs. Murphy was drawing $10 a week. I believe I am right on that.

Q Well, let's follow the weeks down and see if it refreshes your recollection. Look at the week of October 25? A That appears again.

Q So she was drawing $10 a week, is that right? A Yes, sir.

Q Did she actually go to the shop or was she just put on the books at $10 a week. A She went to the shop.

Q She was there every day? A Pretty much every day, yes, sir.

Q And what was her function there for $10 a week?

MR. BEASLEY: Your Honor, I must inquire what is the relevancy of Mrs. Murphy? She is not a party to the case.

THE COURT: I don't know.

MR. AHERN: I think it is relevant in this respect: Here is my purpose. Naturally, I am attempting to elicit the true status of James B. Murphy. He is the issue in this case, but I think, if I can show a pattern that these books do not truly reflect what these people really did or did not do, those are inferences that I may argue at an
71 appropriate time.

THE COURT: Sustain the objection.

BY MR. AHERN:

Q All right now, your company sells automobile parts, do they not? A Yes, sir.

Q And in 1952, when you had sales that entailed deliveries, who made the deliveries? A We have a delivery system. We have delivery trucks to take care of deliveries.

Q Let's see if we can be more specific. How many trucks did you have in 1952? A I believe we had two.

Q And do you still have them? A Yes, sir.

Q Now, who were the employees that worked for you in 1952 and I will confine it to October, 1952? A Speaking of names or number?

Q Well, let's start with names. Who were they? A Well, we had Theodore Wreschc, and we had two drivers, I do not remember their names, and salesmen, of course, in and out when we could get them.

Q Now, what was the position of your son in that plant in October of 1952? A Could I explain that a little bit?

Q First if you can give me an answer. Was he
72 a salesman? A He, at that time, was a counterman, an inside man.

Q Well, as part of his function, and part of his duties from time to time, did he call on customers and deliver parts? A No, sir.

Q All right. Now, let's assume that you were out of the office and Mr. Wresche was making a delivery and a call came in that Tack Motors wanted three fuel pumps—

THE COURT: Wait a minute, did Wresche make deliveries?

THE WITNESS: No, sir.

MR. AHERN: Let me rephrase my question.

BY MR. AHERN:

Q Who made deliveries? A The drivers.

Q Who were the drivers?

THE COURT: He does not remember the names, he said.

THE WITNESS: I don't remember the drivers' names.

BY MR. AHERN:

Q Let's take a look at the book here. Let's take the week of October 4, J. W. Murphy is listed as an employee. Who is Jack Showman? A He was a machinist.

73 Q So he is not a driver? A No.

Q M. L. Murphy? A No, sir.

Q F. Murphy? A No.

Q Wresche? A No.

Q Pete Beatty? A He was a driver.

Q How long did he work for you? A Well, there off and on perhaps, a year and a half.

Q Steadily? A Well, he quit at one time and then he came back. I don't know just when.

Q Did he make deliveries? A Yes, sir.

MR. BEASLEY: Would you speak up a little louder?

THE COURT: Keep your voice up, please.

THE WITNESS: I will.

BY MR. AHERN:

Q Did he make deliveries? A Yes, sir.

74 Q Do you have his address? A We had his address. I don't have it.

Q You don't know where he is now? A Yes, sir, I do.

Q Where is he? A He is working for Jack Showman over on Bladensburg Road.

Q And what type of work? A Well, he is a machinist now.

Q Do you have the address? A No.

Q Can you supply it to me? A Yes, sir.

Q Sincox? A He was a driver.

Q J. W. Murphy? A No, he was not a driver.

Q All right, now, what are these entries here? Robert Lohr, was he an employee, also? A No, he is the real estate man.

Q Why would he be entered on your books? A Because we rent from him.

Q Doesn't this column purport to be the employees? I don't know what it purports to be. I only know what Lohr is.

Q Let's take McQuay-Norris Manufacturing
75 Company, what is that? A We were doing business with McQuay-Norris.

Q Do you have anything to do with these books, sir? A No, sir.

Q You do not know how they are set up at all? A No, sir, I do not.

Q Now, did James B. Murphy ever make deliveries regularly on customers? A No, sir.

Q I am not talking about 1952 now. I will cover 1952 up through—

MR. BEASLEY: Objection.

THE COURT: Sustained.

MR. AHERN: I have a reason. I can show that in a deposition this man said he never made deliveries.

THE COURT: I will sustain the objection.

Q You paid Mr. Murphy $10 a week for his car, didn't you? A Yes, sir.

Q And you paid Mr. Wresche $10 a week for his car, is that correct? A Yes, sir.

Q Now these other drivers that you talk about, Sincox and the other individual, they did not get $10 allowance for their automobile?

76 THE COURT: Wait a minute. Whose automobiles delivered these?

THE WITNESS: The company's car, sir.

BY MR. AHERN:

Q Are you saying that all parts that were delivered by Murphy Auto Parts, Inc., were delivered in a company truck? A Yes, sir.

Q Why was James B. Murphy paid the $10? A Can I go into detail, sir?

Q No, can you answer the question why he was paid $10 for his car? A To help him out while he was in college.

Q When he was working for you, he came to work for you, you paid him $50 a week, didn't you? A Yes, sir.

Q Then you listed on your books $10 as a car allowance. A I think that is correct.

THE COURT: Wasn't that to provide the expense of coming and going to work?

THE WITNESS: No, sir, it was not my intention for him to get that money for that purpose.

THE COURT: You mean that that isn't the truth then, is that what you are trying to say?

77 THE WITNESS: I don't know what he took it at but my idea was to help the boy to get through school. I was trying to give him all the support that I could.

THE COURT: You gave him $10 a week extra?

THE WITNESS: I was trying to get him some money. I was trying to do all I could for him.

THE COURT: You did not give him $10 a week for car allowance?

THE WITNESS: That was not my intentions. Now, how it was given to him, i don't know. I know I was asked about it and I told him when we first started of and he was first in school, first started off in school, his idea was to take business administration to come into the store after he finished school and then when he got his program—

THE COURT: But when he was not in school, you were still giving him $10 when he was not in school.

THE WITNESS: When he was not in school?

THE COURT: Yes, what was that for?

THE WITNESS: Well, he was in school all the time.

THE COURT: You heard him testify today, didn't you?

THE WITNESS: No, sir.

THE COURT: You weren't here this morning, were you?

THE WITNESS: No, sir.

THE COURT: Well, then, there wasn't any time when he worked for you that he was not in school, is that right?

78 In 1952 was he going to school at the time of this accident?

THE WITNESS: No, sir, I think he had finished school then.

THE COURT: But you were still paying him the $10?

THE WITNESS: We had never taken it away from him.

THE COURT: What were you paying it to him at that stage for?

THE WITNESS: The $10?

THE COURT: Yes, sir.

THE WITNESS: Well, I just decided to give him $10 to help him. It would be something for him. It is just one of these things I can't hardly explain.

THE COURT: You were giving him $50 a week?

THE WITNESS: I think that is correct.

THE COURT: Why didn't you give him $60 a week?

THE WITNESS: When he first started to work, I believe I am correct in saying, we were paying him $25 a week when he first started. And his progress was so irregular that I believe that I wanted to get him some more money and I didn't know how to do it. I just take a chance. I did not want to put that earnings, that $10 on the pay roll.

THE COURT: Why?

THE WITNESS: Well, I did not know how things were going to come out. We had just started in business
79 and it was pretty rough. There was no reason to give him a car allowance because he wasn't using his automobile.

THE COURT: How was he getting from the house to the office?

THE WITNESS: Well, he was using his car. But I didn't give it to him particularly for his automobile. Now, it may be taken that he used it for automobile but I did not have that intention.

THE COURT: Why was it put on the books of your company as automobile allowance?

THE WITNESS: I do not know, that is about the only way it could be entered on the books. I know I talked to our auditor about the thing and he said that would be the best that way, to enter it on the books.

BY MR. AHERN:

Q Now, would you give me the name of the auditor? A Schell Hoye.

Q And you were aware, were you not, that each week on your book there was a $10 entry for car allowance and no social security and no withholding tax was deducted from that $10? A Yes, sir.

Q And you knew that Social Security and Withholding Tax were deducted from the $50? A Yes, sir.

80 Q This $10 that W[illegible]che was getting, was he getting that for going to school? A No, sir.

Q What was he getting it? A Well, the pressure was put because James was getting $10. We were just struggling. It was a question of staying in business.

Q What were you paying Wresche a week? A I believe it was $50.

Q Why didn't you pay him $60? A Because we did not want to enter a permanent $10 increase. We did not know whether we could continue with it or not. You can't give a man a raise one day and take it away from him the next day.

Q As a matter of fact, each week Wresche was given as $10 car allowance, isn't that correct? A Yes.

Q But that had nothing to do with the use of his car? A No, sir.

Q And now, of course, when you—I gather Mr. Hoy prepared your income tax return from these books, did he not? A Yes, sir.

Q And you knew, did you not, that a business deduction was taken for these car allowances? A Yes, sir.

THE COURT: Wait a minute. I will take a recess. I will see counsel in my office.

(At 2:45 p. m. a recess was taken.)

* * * *

PROCEEDINGS

Thereupon

MILBURN MURPHY

a witness called by counsel for the Plaintiffs, having been duly sworn, resumed his testimony as follows:

DIRECT EXAMINATION—continued

MR. AHERN: Read the last question and answer, please?

(The reporter read the record as follows:)

"Question: And you knew, did you not, that a business deduction was taken for these car allowances?

"Answer: Yes, sir."

BY MR. AHERN:

Q You knew that, didn't you? A Yes, sir.

THE COURT: I do not think that you should follow that line of questioning.

MR. AHERN: All right.

BY MR. AHERN:

Q I believe you testified earlier, sir, that in October, 1952, James B. Murphy was not traveling, visiting customers during the workday, soliciting orders and so forth, is that right, making deliveries? A I don't believe I testified on that, no.

Q Let me ask you now then, in 1952, in particular, October, 1952, was James B. Murphy, did he from time to time during the course of his employment in that month of October, 1952, call upon customers? A No.

Q You recall, do you not, sir, when Murphy Auto Parts, Inc., was named as a defendant in Civil Action 943-55? Just try to confine your answer to my question. You know, do you not, that an action was filed in this suit that was filed naming Murphy Auto Parts, Inc., as a defendant, Civil Action No. 943-55, just answer, do you know that an answer was filed in behalf of Murphy Auto Parts, Inc? Just yes or no. A I know there was an answer filed, yes.

MR. AHERN: Your Honor, I am now directing the witness' attention to the Answer which was filed in Civil Action 943-55.

BY MR. AHERN:

Q With regard to Allegation 7 in that Answer it says as follows:

"The Defendant admits that it pays an allowance to Murphy for the use of the automobile which he was operating but that such allowance is only for the use of the automobile made by James B. Murphy in calling on customers of this defendant during business hours and this defendant alleges that at the time of the accident alleged

in complaint, the said James B. Murphy was not engaged in or doing any business for this defendant and was not working or acting within the scope of his employment and was not entitled to nor did he receive any allowance for the use of his automobile at the time of the alleged accident herein."

I will ask you this, sir: The complaint that was filed in that case to which that answer was filed alleged that in October of 1952 James Murphy received compensation for the use of his automobile and you admitted that in your answer.

Now I will ask you, did you transmit to the attorney who filed that answer in your behalf, the fact that Murphy did not travel to see customers in October of 1952? A Did he travel? Do you want to know where he traveled?

Q Did you impart to your attorney when he filed that answer, did you tell your attorney when he filed that answer, did you say Murphy did not go and see customers and call upon customers in October of 1952—just yes or no, did you tell him that? A Oh, no, I did not.

THE COURT: Did you tell him that he did?

THE WITNESS: No, I don't remember having any conversation with anyone about that.

THE COURT: How did it get in the answer?

THE WITNESS: I don't know.

THE COURT: You didn't tell him?

THE WITNESS: I don't remember that I told him that.

THE COURT: Did he discuss the matter with you when it came time to file the answer?

THE WITNESS: There was some discussion about it, but I don't remember whether I told him this or not.

THE COURT: Where did he get the information to put in the answer?

THE WITNESS: I don't know.

BY MR. AHERN:

Q Then in so far as that answer alleges and states that Murphy called upon customers during the business hours, then that answer is incorrect, is that what you are saying? A I wouldn't say it is incorrect, no, but I just don't remember giving it.

THE COURT: The question is, is it incorrect, not whether you gave it or not. Your answer filed in this suit admits that James B. Murphy, during the daytime, called upon customers of your corporation, is that true or not?

THE WITNESS: He has called on customers, yes.

THE COURT: Did he call on customers in October, 1952?

THE WITNESS: No, I don't believe he called on customers in October, 1952.

I do not believe so.

87 BY MR. AHERN:

Q You don't know where your lawyer got that information to file that answer, is that your testimony? A I don't believe that he called on customers in October, 1952.

Q That isn't my question. You don't know where your lawyer got the information to put that in that answer do you? A No, I don't know where it came from.

Q Now, I want to ask you this: No. 1, did you see this pleading which was filed in behalf of your son, James B. Murphy, entitled—over the signature of Mr. Beasley—entitled "Memorandum in Oppostition to Plaintiffs' Motion to Amend Complaint and add Murphy Auto Parts, Inc., as a party defendant." I will just ask you first, will you look at that pleading, read it, and tell me whether you have seen that before? A Is this before of after that time you met in your office?

Q Sir, I will make my question very simple, my question is, have you ever seen that pleading before? A Well, sir, I can't say because I have read these pleadings. I don't know which one these pleadings are.

THE COURT: If you read them all, you have seen that one.

THE WITNESS: Well, then, if that is the case, I have seen it.

88 THE COURT: What do you mean, that is the case, you just said you read the pleadings?

THE WITNESS: I can't remember what pleading this is, it would be hard for me to say whether I read this or not, sir. The reason I asked Mr. Ahern the question was because I believe when I was in Mr. Ahern's office was the first time that I ever got concerned with this thing.

MR. AHERN: Your Honor, maybe I can get at it this way.

Q Since you say you have read all the pleadings, let me first, before I show you that pleading which I have just identified to you, let me show you, do you recall reading this pleading which is marked "Points and Authorities in Support of Amended Motion to Amend Complaint and Add Parties Defendant." I just want to ask you if you have ever seen that pleading before?—A I don't remember reading that pleading.

Q All right, now, well, have you looked at it? A Now, I have looked at it.

A Do you ever recall reading a pleading in which the Plaintiff sought to amend his complaint and add a party defendant, and as part of his reasons for asking that the Murphy Auto Parts, Inc., be added as a party defendant, he stated in his pleadings—

MR. JOHNSON: I think for counsel to quote
89 his own pleadings here—in the first place, pleadings are not evidence, that is a party not an attorney.

THE COURT: He is asking if he read the pleadings. I do not know what the question will be.

MR. JOHNSON: I object to his reading his own pleadings, especially a memorandum addressed to the Court and not in the form of a pleading in the case.

MR. BEASLEY: Your Honor please, I think this whole thing is misleading and should not be allowed to be con-

tinued. The memorandum does nothing more than refer to the Answer of the Defendant James B. Murphy to interrogatories.

I ask you to look at it, if you will, sir.

THE COURT: I don't know what the question is.

MR. AHERN: I haven't had a chance to complete the question.

MR. BEASLEY: You have completed several of them along this line and I submit the whole line of inquiry is improper.

THE COURT: I don't think so, go ahead.

BY MR. AHERN:

Q Now, will you listen to my question, sir: Do you recall reading this pleading which I have pointed out to you in which on page 5 of the pleading there is set forth the various answers to interrogatories filed by your son in which he stated he called on customers? I will ask you, have you read that pleading? A I don't remember reading that pleading, no.

MR. BEASLEY: Since you referred to my memorandum, would you read the whole thing?

MR. AHERN: Oh, yes. I intend to offer this in evidence, Mr. Beasley, as an admission.

Your Honor, at this time I would like to offer in evidence the Answer of—I think your Honor maybe I should like to offer in evidence the answer filed in behalf of Murphy Auto Parts, Inc., and I would like to offer in evidence the interrogatory answered by James B. Murphy—the pertinent interrogatory, which I will specify to your Honor, and I wish to offer in evidence the memorandum of points and authorities—

MR. BEASLEY: Let's take them one at a time so we will know what we are talking about, if I may suggest.

MR. AHERN: Suppose I do it this way: First of all I offer the answer of the defendant Murphy Auto Parts, Inc.

MR. JOHNSON: In which case?

MR. AHERN: In 943-55, filed by Mr. Thomas Heffelfinger.

THE COURT: There is no objection to that, is there?

MR. JOHNSON: No objection.

THE COURT: All right.

DEPUTY CLERK: Plaintiffs' No. 5.

91 (Answer of Defendant Murphy Auto Parts, Inc., in Action 943-55 was marked Plaintiff's Exhibit No. 5 in evidence.)

MR. AHERN: Second, I would like to offer in evidence the answers—no, I will do it in this order—second, I would like to offer in evidence Answers 11, 12, 13—No. 11, 12, 17 and 20.

THE COURT: May I see them?

MR. AHERN: Yes (handing to Court).

THE COURT: Where are the interrogatories?

MR. AHERN: I can point them out to your Honor.

MR. BEASLEY: I have them in my file right at hand, if your Honor would care to use that.

MR. AHERN: In connection, your Honor, with the interrogatory, it is necessary for me to state this, in order to emphasize my argument that these are admissible, I would like your Honor to read the interrogatory along with my motion to amend complaint and add party defendant and the opposition filed by counsel for the defendant James B. Murphy over the signature of Mr. Beasley.

THE COURT: I don't think that is necessary. I will read the interrogatories and the answers.

They may be admitted, the interrogatories and the answers.

MR. BEASLEY: If your Honor please, I wish
92 to make the objection that if they were offered, that all of them bearing on the same subject matter should be—

THE COURT: That is up to you when you get around to it. All he has offered are these four and they are germane to the issue in this case.

MR. AHERN: I also move your Honor to admit the Points and Authorities filed by the—

THE COURT: How can I take that?

MR. AHERN: Here is the theory I think that is admissible, in that opposition filed by Mr. Beasley, he does not contest my assertion in my motion to amend complaint that he was calling on customers in October—

THE COURT: You don't need that because he says so in answer to the interrogatories. Do you want to read the interrogatories?

MR. AHERN: Yes, may I do that, your Honor?

(Plaintiff's Exhibit No. 6 is received in evidence.)

MR. AHERN: Interrogatory No. 11:

MR. JOHNSON: If your Honor please, may we have the date of this Interrogatory and answer—

MR. AHERN: Interrogatory No. 11 which was filed on the 16th day of April, 1954—that is, it was filed in the Clerk's office, says: "Do you receive any income or expenses for use of your automobile in your business?"

93 The answer to Interrogatory No. 11 was, "For use in calling on customers during business hours I received an allowance or expense reimbursement that has been averaged out into a flat sum payable weekly in addition to a salary."

Then in response to Interrogatory No. 12:

"State in full what your duties consist of." Interrogatory No. 12:

Answered by James B. Murphy—

THE COURT: That is in 1954. You don't put any interrogatory of what his duties were or did he call on customers in 1952?

MR. AHERN: That was my point that my interrogatory by itself did not specify, and the defendant attempted to say or did say that he answered them as of the time the interrogatory was propounded. That is what made my motion to amend complaint and the opposition filed by Mr. Beasley so important for the reason, when I filed my

motion to amend the complaint I stated in my reasons why the complaint should be amended that in October of 1952 by the answers of the Defendant James B. Murphy he admitted that he was calling on customers.

THE COURT: In 1954?

MR. AHERN: In 1952.

THE COURT: Where does it show in the answers to the interrogatory that he admits that in 1952 he
94 called on customers?

MR. AHERN: The point is when I wrote up my motion, I construed those answers as obviously applying to October of 1952 because that was the only date I was interested in. My point is that Mr. Beasley answered my motion to amend complaint in which he made the assertion that his interrogatories show that he was calling on customers in October of 1952, Mr. Beasley did not contest that and in his points and authorities he said yes, assuming all this is true, the Court still should not allow the complaint to be amended. I say, your Honor, that the pleading filed by Mr. Beasley in opposition to my motion to amend complaint cures whatever technical argument could be made that I did not specify in each interrogatory that I was asking it as of October, 1952 which, of course, was the plain inference to be derived from the interrogatories.

THE COURT: Where is the memorandum?

There is nothing in this memorandum that says he did that in 1952.

MR. AHERN: Except, your Honor, that is a reply to my motions asserting that the answers to interrogatories show that in October of 1952 he was calling on customers and I say, your Honor, if that were not the case, he should have stated in that opposition.

THE COURT: He says in here that since De-
95 cember, 1953, he has worked irregularly without any picked hours but for use in calling on customers during business hours he received an allowance for expense and so forth.

MR. BEASLEY: Would you read the last sentence, if your Honor please, in that paragraph?

THE COURT: That in general he manages the store, you mean?

MR. BEASLEY: No, your Honor. After summarizing everything in the answer to interrogatories, I say there is nothing else of record on the point and Plaintiff has not made any showing of any additional facts if any there be, and it is on that basis that I opposed his motion, that the record doesn't show any foundation for it. I think that is the only fair construction of my memorandum.

MR. AHERN: The point I make, your Honor, is that in the motion I filed, I set out in detail the interrogatories which I seek to admit now.

MR. BEASLEY: You set out a lot of things.

MR. AHERN: Yes, I did and I asserted in that memorandum he was calling on customers in October 1952, Rule 7 (c) says that a special defense must be especially set up. I say this, your Honor, if they were going to contend or try to contend—

MR. BEASLEY: Excuse me for interrupting, but I am representing the Defendant James Murphy, not the corporation. I am not speaking for the Corporation, never have.

96 MR. AHERN: Of course an admission by the Defendant, your Honor—I still can introduce as an admission against the defendant.

THE COURT: I will sustain the objection.

MR. AHERN: Your Honor sustains the objection to the Memorandum?

THE COURT: And the interrogatories and answers. I have to do it because there is no showing that the answers were made as of October, 1952.

MR. AHERN: Your Honor, may I just be heard a little further on that for this reason: I think the Rule 7 (c) requires that a special defense be especially pleaded.

Now my point is this: When I filed this motion, when

I propounded these interrogatories, No. 1, I say, your Honor, in view of the testimony of the witness, it is a question of fact as to whether—

THE COURT: You should have asked in the interrogatories, in October, 1952 did you receive an automobile allowance?

MR. AHERN: That may be, your Honor, I don't say—I didn't put any date in the Interrogatory, he did not say as of April, 1954. It was obvious I was not interested in April of 1954, we all know I was not interested in April of 1954.

MR. JOHNSON: I object to further statement
97 of counsel at this point.

MR. AHERN: In any event, your Honor, even assuming for the purpose of argument—

MR. JOHNSON: May we approach the Bench, your Honor?

THE COURT: Very well.

(At the Bench.)

THE COURT: Don't put error in the case.

MR. AHERN: I don't want to put any error in this, I will grant you that, I would rather step back than put error in, but let me express my thinking a little and see where we stand. My point is this: Of course, an interrogatory is an admission. I recognize that, at least the research on this, an equivocal admission is not admissible if the defendant answered a question under a mistake of fact, it can be argued that it is not admission, but of course, your Honor, the record in this case, each pleading filed over Mr. Beasley's signature is an admission of the Defendant James B. Murphy.

When I filed a motion to amend the complaint and add the Murphy Auto Parts, Inc., as a party defendant, I stated in my motion in October of 1952 this man was calling on customers and No. 2, he was receiving allowance for his car.

And then I set forth in my motion to amend the interrogatories which I seek to admit now in his answers. Did

Mr. Beasley come back and say, oh, no, when we answered those interrogatories, we were thinking of April of 1954? We didn't answer those interrogatories on the basis
98 of what he was doing in 1952?

He comes back in a memorandum in opposition and says conceding everything you said, he says Plaintiff based his motion on the fact that he called on customers and he received an allowance, and that is his answer.

THE COURT: There is enough in his answer in reference to that, since 1953 such-and-such a thing happened, then he proceeds and says that. I don't think I had better let it in.

MR. BEASLEY: Your Honor, may I bring one thing to your attention: Mr. Ahern has argued rather extensively in the hearing of the jury on these contentions as though there has been some kind of a subterfuge or trickery here.

THE COURT: No, he isn't arguing any trickery at all. He is arguing to attack the credibility of the witnesses.

MR. BEASLEY: Exactly, I ask your Honor to say to the jury that you have examined these memoranda and find nothing in them contrary to what has been—

THE COURT: No, I am not going to make any such statement as that. If you wanted to object to his argument in front of the jury, you should have done it a long while ago and have approached the Bench on it. I am not going to admit it.

99 MR. BEASLEY: Remember this one thing, if you please, you said to him that you would have to sustain the objection because it referred to an earlier date—

THE COURT: There is enough in there to cause a doubt in my mind when, in fact, it could very well have been the date he is referring to.

MR. BEASLEY: The Memorandum, I submit, fairly construed, does no more than oppose the motion on which he has the burden of making a showing.

THE COURT: Yes, but it also can be construed that you are talking about the same time he is talking about. Why should you admit something which he alleges occurred in 1952?

MR. BEASLEY: Suppose it should take that construction, there is nothing wrong with the memorandum.

THE COURT: I am not saying there is anything wrong with it. He isn't, either, is he?

He is not complaining about your memorandum.

MR. BEASLEY: But the whole purpose here is to try to attack credibility of the witnesses.

THE COURT: You can't blame him for that, can you?

MR. BEASLEY: Not if he does it properly.

THE COURT: You can introduce pleadings in depositions.

MR. BEASLEY: Memoranda?

THE COURT: Yes, memoranda, what you say
100 is his, you are his lawyer.

MR. BEASLEY: I think that the way this thing has been handled, it has been prejudicial in arguing this matter before the jury the way it has been, and I think it has been a perversion of any fair construction of what the memoranda is.

THE COURT: You filed your memorandum, what are you doing, talking about 1954, when the accident occurred in 1952?

MR. BEASLEY: I was opposing the motion and I was saying the only thing of record was this, and I think your Honor must agree that my memorandum does no more than fairly summarize the answers to the interrogatories and then says that is all there is of record. Plaintiff has made no showing of anything more.

THE COURT: All right. Let's go ahead.

MR. JOHNSON: I would like to join with Mr. Beasley.

THE COURT: You have joined, go ahead.

(In open court.)

MR. AHERN: That concludes my examination, your Honor.

THE COURT: I might say this by way of brief explanation, ladies and gentlemen of the jury, that the Court is not going to admit the interrogatories or answers
101 or memorandum because it has not definitely been established that they refer to 1952.

Any questions?

MR. JOHNSON: No questions.

THE COURT: That is all. Step down.

(Witness excused.)

* * * *

102 RITA H. BALL

was called as a witness and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. AHERN:

Q Will you state your full name? A Rita H. Ball.

Q Where do you live? A 4256. Southern Avenue, Southeast.

Q Are you the mother of Thomas Ball here seated to my right? A I am.

Q Directing your attention to October of 1952, did something unusual happen on October 20, 1952? A Yes.

Q You are familiar, are you not, with the area,
103 Minnesota and B Street? A Yes, I am.

Q Will you tell his Honor and the members of the jury, did there come a time on October 20, 1952 when you came in the vicinity of Minnesota and B Street? A Yes.

Q Where were you returning from? A Work.

Q And where did you work? A 2430 E Street, Northwest, Central Intelligence Agency.

Q What means did you use to get to this area? A Street car and bus.

Q Do you recall the particular bus that you got—I mean what the heading would be on it? A Not really. It could have been one of two.

Q Will you tell his Honor and the members of the jury, when you got off the bus, what was the first thing that happened. Tell us in your own words. A When I got off the bus, I crossed the street to the opposite side, my home.

Q Before you do that, let me ask you this: Were there people in the vicinity at that time—were there people in the street or on the sidewalk or what? A You mean where I got off the bus?

104 Q Yes. A I don't know, for sure. I imagine there were.

Q Tell us in your—

THE COURT: What time was it?

THE WITNESS: Approximately six o'clock.

BY MR. AHERN:

Q Tell us in your own words now what happened. A I got off the bus and crossed the street. I got on the other side of the street. A woman approached me.

Q Without going into what that woman said, was she accompanied by any body? A It was a lady and a man.

Q Do you see that man here today? A Yes.

Q Would you point him out? A Mr. Murphy.

Q Can you tell his Honor and the members of the jury when Mr. Murphy approached you, had you found out at that time that your son had been hit? A Yes, momentarily I had.

Q Can you tell his Honor and the members of the jury first of all what was the circumstances under which Mr. Murphy addressed you? A He expressed his regrets.

Q What was his condition? Was he calm or was he nervous or what was his general condition? A I would say he was excited.

105 Q What did he say to you? A He told me that he was sorry, that he hoped my son wasn't seriously hurt, he had to call on a customer and was in a bit of a hurry to get home.

Q What transpired after that? A Well, that happened while I was going into the doctor's office. I went into the doctor's office.

Q Did Mr. Murphy accompany you into the doctor's office? A Not that I know of.

MR. JOHNSON: If your Honor please, I wish to make an objection at this time.

THE COURT: I did not get what the question was.

MR. JOHNSON: The evidence offered, your Honor, is that Mr. James Murphy made a certain statement to the witness when she got off a bus at this location, something to the effect that he had called on a customer and was in a hurry to get home.

I move the Court to strike that testimony as not applying or not applicable to any case against the Murphy Auto Parts Company on the ground that any admission made by Mr. Murphy at that time and under those circumstances or any statement made by him at that time and under those circumstances is not admissible in evidence against the Murphy Auto Parts Company.

THE COURT: Take the jury out.

106 (The jury left the courtroom at 2:07 p.m.)

MR. JOHNSON: Your Honor, may I have the stenographer read back the statement of the witness to which I refer so we may have the exact words.

MR. AHERN: I think the statement you made was substantially what the witness said.

(The reporter read the last question and answer as above recorded.)

MR. JOHNSON: I understood that to constitute two separate statements, one that he had had to call on a customer. Is that what was said, and that he was in a hurry to get home.

That part of the witness' statement referring to calling on a customer I submit is inadmissible as a declaration made under those circumstances.

First, I would like to point out that it has not been shown that this statement was made under any circumstances which would have constituted the res gestae, certainly by any testimony in the case up to this time.

The point of time of the making of the statement has not been shown by this witness.

THE COURT: She says she got off the bus about six o'clock.

MR. JOHNSON: Yes.

THE COURT: There was testimony the accident happened about 6:15. She testified that when she saw
107 the driver of the truck at the scene—was it at the scene of the accident?

THE WITNESS: Yes, sir.

THE COURT: —that he was nervous and he made the statement. So I am not concerned about the res gestae, it is just whether or not this can be admitted to show agency.

MR. JOHNSON: As the Court knows, I rely on this decision and the line of decisions which seem to follow Dudley against Preston Motor Company.

THE COURT: There is Annotation in A. L. R. 163 which says by the weight of authority the declaration of one alleged to have caused an accident, that he was employed by the defendant or that he was then engaged in some business for the defendant is inadmissible even though made under such circumstances as would otherwise qualify it as part of the res gestae.

MR. JOHNSON: Your Honor referred to that—I have it in my hand, your Honor.

THE COURT: I want to take a look at Kass vs. Gilkerson again.

MR. JOHNSON: I would like to refer to that case. I read it again in your office, your Honor. The point was not raised there. If your Honor reads it, I think you will find that is so.

THE COURT: How do you distinguish Kass vs. Gilkerson?

108 MR. JOHNSON: From my reading of it, your Honor, I think probably the testimony was admitted in the trial.

THE COURT: Was what?

MR. JOHNSON: That the statement made by the agent was admitted as part of the res gestae by the trial court and it was, therefore, not objected to, and was therefore considered by the Court of Appeals as being a part of the evidence in the case. As your Honor will note—

THE COURT: The Court of Appeals says here plaintiffs proved by the testamony of Officer Southard as part of the res gestae that at the scene of the accident Bushrode stated he had been down in Southern Maryland visiting relatives and made a delivery for defendants on his way home.

MR. JOHNSON: I understand that, that must be that the point was not raised at the Lower Court, the testimony simply went in, was in the record on appeal, and being there was no question raised about it below or on appeal, the Court of Appeals did not consider it at all. There was no question on the admissibility of the testimony in either of the Courts

THE COURT: But there was a motion for a directed verdict made and motion for judgment non obstante veredicto, which were based upon the contention that on all the evidence there was no substantial proof that at the time of the accident Bushrode was acting within the scope of his employment.

109 These motions were denied and the case was brought to the Court of Appeals with nothing stated as to whether or not it was improper for the driver to have testified that he had made a delivery.

MR. JOHNSON: That is my point, your Honor. If it were not objected to, then it did go into evidence in the case. We are at the point where we are objecting to this

statement going into evidence and asking the Court to exclude it. If the Court should rule on this, then it would be a question—if the Court denied this motion, then it would be a question on appeal.

Apparently in that case it didn't happen at all, it was considered to be in evidence. As your Honor knows, the Court of Appeals does not raise these questions on their own, and it can not be raised the first time on appeal.

Apparently it was passed over in the District Court.

I would like to call the Court's attention to another of the cases cited under the reference you have just read and that is the case of Leader against Pennsylvania Match Co. 311 Pennsylvania. There is a case where the driver struck a pedestrian and admitted that, and the owner of the truck by whom he was employed admitted that employee was his agent, that Emery used the car generally in connection with the duties as a salesman for the defendant. There were papers and catalogs in the car at the time of the accident belonging to the Pennsylvania Match Company which was his employer. Shortly after the accident, and while he was in an excited condition, Emery told the night superintendent at a nearby hospital that at the time of the accident he was returning from a sales trip for his employer. In ruling on the admissibility of that statement the Appelate Court of Pennsylvania said the Court admitted the testimony of Mrs. Swank, who was the hospital superintendent, under the res gestae rule.

We are assuming that the testimony meets the requirement of this rule in the respect that Emery's statement was sufficiently close to the time of the accident and that it was spontaneously made under excitement which tragedy brought about.

We think, however, that it was inadmisible because it did not relate to the accident itself but was a reference to something not directly connected with the accident at all,

the statement that he was returning from a sales trip had nothing to do with the accident.

Declarations of an actor in an accident should be admissible as part of the res gestae must be statements of what occurred in and at the time of the accident. The fact that the driver was returning from a sales trip does not relate to the accident or in any way emanate from it but is rather a reflective narrative of an event unconnected with the accident.

That is right along the point we are making here, your Honor.

111 THE COURT: I will want to read the case.

MR. JOHNSON: There is another citation I have in A.L.R. 3 A.L.R. 2nd, 606.

THE COURT: Have you got the one in 150? Have you anything else to say, Mr. Johnson?

MR. JOHNSON: I think I have made the point as clear as I can to your Honor. I think your Honor understands it very well.

THE COURT: It is elementary, of course, that the ex parte declarations of an agent are incompetent and inadmissible to prove that he was acting within the scope of his employment.

In this case we already have competent testimony to the effect that the relation of master and servant or principal and agent or employee and employer applied. The only remaining question being whether or not at the time the accident happened, it happened within the scope of the employment.

I am, therefore, ruling under those circumstances that where evidence of the statement made by the driver James B. Murphy, that at the time of the accident he was on his way to visit a customer to be properly admitted as part of the res gestae.

You may have an exception.

Bring the jury in.

MR. JOHNSON: I did not know what your Honor was going to say. May I present that point a little more at length?

112 THE COURT: I asked you that and you said you had nothing more to say.

MR. JOHNSON: I thought your Honor was going to rule on that point alone without reference to the evidence.

THE COURT: What point alone?

MR. JOHNSON: As to the admissibility of the statement.

THE COURT: I have admitted it.

Bring in the jury.

* * * *

152 COURT'S CHARGE TO THE JURY

THE COURT: Ladies and Gentlement of the Jury: There are three civil actions before you for determination. One is Civil Action No. 5224-52, brought by Thomas Charles Ball, the infant, through his next friend, Rita Ball, who is his mother, against James B. Murphy alone for damages for injuries sustained by James B. Murphy as a result of an accident which occured in the District of Columbia on October 20, 1952 while the Plaintiff, Thomas Ball, was crossing Minnesota Avenue at or near the intersection of B Street, Southeast.

That suit is for damages for injuries to the infant plaintiff.

The other suit is Civil Action No. 943-55, which is a similar suit brought by Thomas Charles Ball through his next friend Rita Ball, his mother, against Murphy Auto Parts Company, Inc., a corporation, for damages for injuries sustained by the infant plaintiff, alleging that the driver, James B. Murphy, at the time of the accident, was the agent of the Defendant Murphy Auto Parts Company.

So, these two suits are for damages for injuries sustained by the minor plaintiff against two defendants.

James Murphy, individually, and Murphy Auto Parts, Inc., a corporation.

The third suit, Civil Action 1468-55, is a suit filed by George J. Ball, Sr., and Rita Ball against James
153 B. Murphy and Murphy Auto Parts Company, Inc., for damages to compensate the parents for the expenses incurred for Thomas' medical care and treatment and also for future medical care and treatment if you find that such is necessary. They don't receive damages for injuries sustained by Thomas. That goes to him or rather, to his mother as next friend for him. But this third suit is filed by the parents of the child to compensate them for moneys expended or that are to be expended, or moneys that are due to doctors, hospitals, X-ray technicians, medicines, and the items of detriment that have been testified to.

It becomes my duty, ladies and gentlemen of the jury, to instruct you in the law that applies to this case, and it is your duty to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case and to consider and weigh the evidence for that purpose. I do not intend by any instruction to tell you how you should determine any question of fact. If your recollection of the evidence should differ from my statements in regard to the facts in the case, then your recollection must prevail.

The Court is permitted to comment on the facts and on the evidence in order to assist you and aid you in arriving at your conclusions. But the Court's comments on the facts and on the evidence are not binding on you and you need attach to them only such weight as you deem wise and proper.

154 If, in my instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the

others, but you are to consider all the instructions as a whole and to regard each in the light of all the others.

At times throughout the trial, the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inference from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence, nor does it pass on the credibility of the witnesses. As to any offer of evidence that has been rejected by the Court you, of course, must not consider. As to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

You must weigh and consider this case without regard to sympathy, prejudice or passion for or against any party to this action. If, during this trial, I have said or done anything which has suggested to you that I am inclined to favor the claims or positions of either party, you will not suffer yourselves to be influenced by any such suggestion. I have not expressed or intended to express, nor have I intended to intimate any opinion as to which witnesses are or are not worthy of belief, or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, you are instructed to disregard it.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so, without doing violence to your individual judgments. You each must consider the case for yourself but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to

vote in any way on any question submitted to you by the single fact that a majority of the jurors or any of them favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors.

You shall not consider as evidence any statement of counsel made during the trial unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

156 You shall not consider the conferences that have been held at the Bench, for the matters taken up at the Bench conferences were purely questions of law and of no concern of yours.

You are to decide this case solely upon the evidence that has been received by the Court and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom as noted in my instructions and in accordance with the law as I shall state it to you.

In the first place, in judging the credibility of witnesses you shall have in mind that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony, or by evidence pertaining to his motives. In determining the issues of fact submitted to you, you shall consider and weigh the testimony of all the witnesses who have testified at the trial as well as all the circumstances concerning which testimony has been given. Remember that you are the sole judges of the credibility of the witnesses. In determining whether to believe the testimony of any witness and in weighing the testimony of any witness, you may consider the demeanor of the witness on the witness stand, the witness' manner of testifying, whether the witness impressed you as a truthtell-

ing individual, whether the witness impressed you
157 as having an accurate recollection, and you may
also consider the interest of the witness, if any, in the outcome of the case in determining what weight to attach to the testimony of a witness.

In weighing the testimony of witnesses, it is proper for you to consider those factors of human nature which, either with or without any wrongful intention, may obstruct the giving of perfectly true testimony. Those factors are suggested by these questions: Did the witness have full opportunity to learn the truth? If so, did he have the intelligence and purpose to ascertain the facts? What was the advantage or disadvantage of his point of observation? Does the evidence show that the witness had a motive for favoring or an inclination to favor any party? In other words, was he a biased or impartial witness? What degree of intelligence, what quality of memory, and what grade of moral purpose so far as concerns this case were revealed by his appearance and his manner of testifying and all the other evidence in the case? Was the testimony reasonable and consistent within itself and with uncontradicted facts?

You are also instructed, ladies and gentlemen of the jury, that if you find from the evidence that any witness has knowingly testified falsely of a material fact about which the witness could not reasonably have been mistaken, then you are at liberty to disregard the entire
testimony of such witness or consider such part
158 thereof as you may deem worthy of belief.

You are not bound to decide this case in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declaration of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force. This does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice or from

a desire to favor one side as against the other. It means that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on opposing sides. It also means that the final test is not in the relative number of witnesses but in the relative convincing force of the evidence.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly without an inference or presumption and which, in itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not, of itself, conclusively establish the fact in issue but which affords an inference or presumption of its existence.

Indirect evidence is of two kinds, namely, presumptions and inferences. A presumption, ladies and gentlemen of the jury, is a deduction which the law ex-
159 pressly directs to be made from particular facts. Unless declared by the law to be conclusive, it may be controverted by other evidence, direct or indirect, but unless so controverted, you are bound to find in accordance with the presumption.

An inference, on the other hand, is a deduction which the reason of the juror draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business or the course of nature. The word "propensity" as here used simply means any natural or habitual inclination or tendency.

You are also instructed that a person who by education, experience and study has become an expert in any art, science or profession and who is called as a witness may give his opinion as to any such matter in which he is versed and which is material to this case.

Here the Plaintiff, as one of the allegations of negligence, has charged that the defendant operated his vehicle at an excessive speed under the circumstances and that as a result of the defendant's negligence in operating his vehicle at an excessive speed, the minor plaintiff was injured as a result of this negligence.

The defendant James B. Murphy called as an
160 expert witness Lt. Nicholson of the Police Department who was qualified as an expert in traffic matters and who expressed an opinion as to the minimum speed at which the defendant operated his vehicle on October 20, 1952. You should consider such testimony and should weigh the reasons, if any, given for it. You are not bound, however, by any such expert testimony or by such opinion of an expert. You may give to it such weight as you determine it is entitled to be given whether that be great or slight, and you are completely at liberty to reject it if, in your judgment, the reasons given for it are unsound.

In civil actions the party who asserts the affirmative of an issue must carry the burden of proof. In other words, the burden of proof as to that issue is on that party. This means that if no evidence were given on either side of such issue, your finding as to it would be against that party. When the evidence is contradictory, the decision must be made according to the preponderence of the evidence by which is meant such evidence as when weighed with that opposed to it has the more convincing force and from which it results that greater probability of the truth lies therein. Should the conflicting evidence be evenly balanced in your minds so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue. In other
161 words, such burden of proof as established by a preponderance of the evidence which is determined

not alone by the greater number of witnesses testifying to a particular state of facts. It means that the testimony on behalf of the party carrying the burden of proof must have greater weight in your estimation, that is, have a more convincing effect than that opposed to it. And, if you believe that the testimony on any essential point in this case is evenly balanced, or preponderates against the party carrying the burden of proof, then your finding as to that point must be against the patry carrying the burden of proof.

In this case the burden of proof is upon the Plaintiff to establish the negligence of the defendant, and the burden of proof is upon the plaintiff to show that that negligence was the proximate cause of the injury.

When I come to the question of contributory negligence, I will instruct you that the burden of proof of showing contributory negligence on the part of the plaintiff is upon the defendant.

You are also instructed as a matter of law that in the consideration of this case you are not entitled to draw an inference of fact from a premise which is wholly uncertain, and if you find that the proximate cause of the injury sustained can be determined only by speculation and conjecture, and you find that the proximate
162 cause of the injuries sustained could have been more than one or many facts wholly consistent with the absence of negligence in the individual defendant, you are not permitted to speculate as to the negligence of the defendant and your verdict must be for the defendants.

You are also instructed, ladies and gentlemen of the jury, the mere fact that an accident happened, considered alone, does not support an inference that some party or any party to this accident was negligent. On the contrary, the legal presumption exists that reasonable care was exercised and the burden is on the plaintiffs to prove by a preponderance of the evidence that the defendant

was negligent at the time of the happening of the accident in question and that such negligence proximately caused the collision in question and that if you find that such evidence of negligence fails to preponderate in favor of the plaintiffs, is equally balanced or preponderates in favor of the defendants, then your verdict must be for the defendants.

Now at the outset of this trial, ladies and gentlemen of the jury, each party, the Plaintiff and the Defendants, are entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence—prima facie merely meaning, at
163 first blush which, of course, is a rebuttable presumption, it is not a conclusive presumption—and will support findings in accordance therewith in the absence of evidence to the contrary. Where there is other evidence that conflicts with such a presumption, it is your duty to weigh the evidence against the presumption and any evidence that may support the presumption, to determine which, if either preponderates.

Such deliberations, of course, shall be related to and in accordance with my instructions on the burden of proof.

You are instructed that the plaintiff in crossing Minnesota Avenue, could assume that the defendant would operate his vehicle in accordance with the traffic regulations then and there in full force and effect unless and until it becomes apparent to a reasonably prudent person exercising reasonable care in such circumstances that the defendant was violating such regulations if he did in fact violate any traffic regulation.

You are instructed also that the individual defendant in operating his automobile on the occasion in question had the right to presume that other persons using the public highway would exercise due care and such right continued until such time as it became reasonably apparent or in the exercise of ordinary care should have be-

come apparent that another person was not going to perform his duty.

164 You are also instructed, ladies and gentlemen of the jury, that ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others. In other words, it is that degree of care, attention or exertion which under the actual circumstances of the case a man of reasonable prudence and discretion would use in reference to the particular thing if it was his own property.

You are instructed that in determining what degree of care the defendant used in operating his vehicle you may take into consideration the following principle: A driver of a vehicle must know that other persons have a right to use the street to cross the same and it is his duty to anticipate that the street will be so used by pedestrians, and therefore it is also his duty to look and to see that such pedestrian is not in the road and that he must operate his machine at such speed that persons rightfully in or properly attempting to cross such street shall not be injured, and thereby avoid injuring them. His failure to see such person in time to stop and avoid injury is no excuse. Due care requires that he shall see such persons so rightfully attempting to cross such street in time to stop his machine. It is negligence to so run the machine that the same can not be stopped and injury avoided after such persons are seen.

165 You are also instructed that if you find that the defendant failed to keep a reasonable and proper lookout and proper control, and you find further that this conduct on his part was the sole proximate cause of the accident, resulting in the injuries to the plaintiff, you shall return a verdict in favor of the plaintiff against the defendant.

You are also instructed that in determining whether the defendant was negligent you are to determine from

all the evidence as to whether his conduct and operation of his vehicle—I am speaking of the individual defendant—was in accord with what a reasonable individual of ordinary prudence would have done under the same circumstances and in this respect he must exercise ordinary care that I have just defined to you.

In this connection you may consider the lighting conditions of that intersection at B and Minnesota Avenue, the pedestrian travel thereon, and the vehicular travel thereon. Inasmuch as the amount of caution used by the ordinary prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution required by law increases as does the danger that reasonably should be apprehended.

This proximate cause that I speak of, the proxi-
166 mate cause of an injury, is that cause which in natural and continuous sequence unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets into operation the factors that accomplish the injury.

You are instructed that even though you should find by a preponderance of all the evidence that the defendant James B. Murphy operated his automobile at the time and place of the accident in question in a negligent manner, yet it will be your duty to return a verdict in favor of the defendants unless you shall also find from all the evidence that the injuries of which the plaintiffs complain were the proximate result of such negligence of the individual defendant. Therefore, if you find from a preponderance of all the evidence that the defendant was negligent, your next inquiry of course will be was the negligence of the defendant the proximate cause which resulted in the plaintiff's injury?

This proximate cause, as I said to you, means the direct and efficient cause. It is that cause but for which the accident would not have occurred. It is not enough for the plaintiffs to show that the defendant operated his automobile in a negligent manner. You must be convinced by a preponderance of the evidence that the negligent operation of his automobile by the defendant was the circumstance but for which the plaintiff's injuries would not have occurred.

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate cause so that it does not preponderate in favor of the party making the charge, then he has failed to fulfill his burden of proof. To put the matter in another way, if, after considering all the evidence, you should find that it is just as probable that either the defendant was not negligent or if he was, his negligence was not a proximate cause of the accident, as it is that some negligence on his part was such a cause, then a case against the defendant has not been established.

What is this negligence that we speak about? Negligence, ladies and gentlemen of the jury, is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent persons would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person. Negligence is not an absolute term but a relative one. In deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the surrounding circumstances as shown by the evidence.

168 This rule rests on the self-evident fact that a reasonably prudent person will react differently to different circumstances. Those circumstances enter into

and in a sense are part of the conduct in question. An act that is negligent under one set of conditions might not be so under another. Therefore, to arrive at a fair standard we ask, what conduct may reasonably have been expected of a person of ordinary prudence under the same and similar circumstances? Your answer to that question gives you a criterion by which to determine whether or not the evidence before you proves negligence.

You will note that the person whose conduct is set up as a standard is not an exceptionally cautious individual, nor an exceptionally skilled one, but a person of only ordinary and reasonable prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct.

The fact that a driver violates a traffic regulation in itself, constitutes negligence and if such negligence is a proximate cause of the accident, your verdict must be for the plaintiff against the driver who violated the traffic regulation.

There are several traffic regulations that have been introduced in this case, ladies and gentlemen of the jury,

169 and if you find from the evidence that the defendant has committed any one of the acts of negligence charged by the Plaintiff and that said act of negligence was the sole proximate cause of the accident and the plaintiff's injuries, then you must return a verdict in favor of the plaintiff.

You are also instructed that the following traffic regulation was in effect in the District of Columbia at the time of the accident alleged in this complaint, Section 54, entitled "Pedestrian Rights and Duties: Notwithstanding the foregoing provisions of this article, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway."

If, after viewing the evidence in this case, you believe by a preponderance of the evidence that the proximate cause of this accident was the defendant's violation of this traffic regulation in not exercising due care to avoid colliding with a pedestrian, or exercising proper precaution upon observing a child in the roadway, then of course your verdict must be for the plaintiff.

You are also instructed that the plaintiff in this case as one of his allegations of negligence against the defendant James B. Murphy contends that the de-
170 fendant did not give full time and attention to the operation of his vehicle in that he did not keep a proper lookout and in this connection you are instructed that the following traffic regulation was in full force and effect in October of 1952, Section 99 (c) as follows: "An operator shall, when operating a vehicle, give his full time and attention to the operation of the same."

You are, therefore, instructed that if you believe from the evidence in this case as established by a preponderance of it, that the proximate cause of the accident was the defendant's violation of this traffic regulation, then of course you must return a verdict for the plaintiff Thomas Ball.

Of course, you should bear in mind, ladies and gentlemen of the jury, as I instruct you upon these violations of the traffic regulations, if you find from the evidence that the plaintiff has not established the violation by a preponderance of the evidence, then of course you must find for the defendant James B. Murphy.

You are also instructed that the following traffic regulation was in effect in the District of Columbia at the time of the accident: Section 22 (a) "No person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards
171 then existing. In every event, speed shall be so controlled as may be necessary to avoid colliding

with any person, vehicle or other conveyance on or entering the street or highway in compliance with the legal requirements and the duty of all persons to use due care.

"(b) Where no special hazard exists that requires lower speed for compliance with (a) of this section, the speed of any vehicle not in excess of the limit specified in this section or established as hereinafter authorized shall be lawful, but any speed in excess of the limit specified in this section or established as hereinafter authorized shall be prima facie evidence that the speed is not reasonable or prudent and that is unlawful: (1) 25 miles per hour unless otherwise designated by official signs.

"(c) The driver of every vehicle shall, consistent with the requirements of (a) drive at an appropriate reduced speed when approaching and crossing an intersection."

If, after viewing the evidence in this case, you believe by a preponderance of the evidence that the proximate cause of the accident was the defendant's violation of this traffic regulation, then of course it will be your duty to return a verdict for the Plaintiff Thomas Ball.

Ordinary and reasonable care is such care as would be exercised by a reasonable and prudent man under the same and similar circumstances, and a failure to exercise this ordinary and reasonable care constitutes negligence.

172

You are also instructed, ladies and gentlemen of the jury, that the law forbids you to attempt to classify negligence in degrees or grades or kinds or to compare one instance of negligence with another and judge which is more deserving of reproof or excuse. If you should find that there was negligent conduct on the part of more than one person, you are not to attempt to determine which was guilty of the greater negligence with a view to delivering a verdict in favor of or to favor in any way the one whose conduct was the least reprehensible.

The defendant in this case claims that the infant plaintiff was guilty of contributory negligence. Contributory negligence, ladies and gentlemen of the jury, is negligence on the part of a person injured which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains. One who is guilty of contributory negligence may not recover from another for the injury suffered. If you find that the defendant was negligent and that his negligence was the proximate cause of the accident, you have another question to consider, namely, whether the plaintiff was guilty of contributory negligence. On the issue of contributory negligence the burden of proof is upon the defendant to establish by a preponderance of the evidence that the plaintiff was
173 guilty of contributory negligence, and unless the defendant sustains this burden you should resolve that issue in favor of the infant plaintiff. You are instructed that contributory negligence is an affirmative defense, and as I have stated it to you, the burden is upon the defendant to prove by a preponderance of the evidence not only that the plaintiff was negligent, but also it must prove that such negligence or negligent acts were the proximate cause of the accident, and of course, if the defendant fails in either of these respects, he has not proven his charge of contributory negligence.

In this respect you are instructed that the negligence of the infant plaintiff in acting as charged by the defendant was a proximate or contributing cause of the accident. If the defendant has failed in either of the aforesaid respects, that is, proving negligence on the part of the plaintiff and that the plaintiff's negligence contributed to his own injuries, then of course he has not maintained his charge of contributory negligence.

In other words, the defendant has the same burden to prove contributory negligence as the Plaintiffs have to prove negligence.

You are also instructed that in determining whether contributory negligence existed in this case on the part of the infant plaintiff, as this Court has defined the term contributory negligence, you are instructed that as
174 a matter of law a pedestrian, whether he be an adult or a child, while crossing a street in the exercise of reasonable care, should look in the direction of anticipated dangers. But it is not incumbent upon him to oscillate his head like the pendulum of a clock. A pedestrian would only be required to exercise such vigilance as would constitute reasonable care under the circumstances.

You are also instructed that there has been testimony in this case that the Plaintiff Thomas Ball crossed the street by means of running. You are instructed that, as a matter of law, the mere running across the street by the infant Thomas Ball by and of itself after he looked and saw no car coming, if, in fact you find that he did look, did not constitute contributory negligence on behalf of the Plaintiff Ball, and before you could determine that the infant was guilty of contributory negligence, you would have to believe by a preponderance of the evidence that the running across the street in front of oncoming traffic, if in fact you find that there was oncoming traffic within a reasonably close distance, fell below that standard of care which the infant Thomas Ball then 8 years of age should have exercised and fell below that standard of care which other eight-year old boys of similar knowledge, education and background should have exercised under the same and similar circumstances.

175 A child, ladies and gentlemen of the jury, is not held to the same standard of conduct as an adult and is only required to exercise that degree of care which ordinarily is exercised by children of like age, mental capacity and experience. There is no precise age at which, as a matter of law, a child comes to be held accountable for his actions by the same standard as

applied to an adult. It is for you to determine the mental capacity and experience of Thomas Ball, and whether his conduct was or was not such as might reasonably have been expected from a child of like age, capacity and experience under the same or similar circumstances.

You are therefore instructed that the plaintiff, being a minor child of 8 years of age at the time of the accident, is not required to exercise the same degree of care that an ordinary prudent adult would exercise under the conditions existing at the time of his injury, but was only required to exercise that degree of care which an ordinary prudent boy of 8 years of age would have exercised under those conditions.

In this connection you are to bear in mind the age, education and opportunities to learn by experience which this plaintiff had been given prior to the accident. If you find that the plaintiff did exercise at the time of the accident that degree of care which a minor boy of
176 his age would have exercised and acted accordingly, then he was not negligent and if you further find that the defendant was negligent in any one of the manners as charged in the complaint and that this said negligence was the proximate cause of the accident, then your verdict must be for the—

if you find that the plaintiff did exercise at the time of the accident that degree of care which a minor boy of his age would have exercised and acted accordingly and that he was not negligent, and if you further find that the defendant was negligent in any of the manners as charged in the complaint and that this negligence was the proximate cause of the accident, then your verdict must be for the plaintiffs.

You are also instructed, ladies and gentlemen of the jury, that the infant plaintiff was under a duty to exercise reasonable care for his own safety, and if you find from the evidence that the infant plaintiff failed and

neglected to exercise that degree of care which a reasonably prudent person of his age and experience should have exercised under the circumstances, then he was negligent. And, if you further find from the evidence that such negligence on his part contributed in whole or in part in proximately causing the injuries complained of herein then the plaintiffs are not entitled to recover and your verdict should be for the defendants.

177 You are also instructed that the accident or collision in question occurred in one of the public streets of the District of Columbia. Both the infant plaintiff as a pedestrian and the individual defendant as the driver of a motor vehicle had the right to use the street and each was under a duty to exercise reasonable care under the circumstances then and there existing to preserve his safety and to avoid injury to the other. You are instructed that the infant plaintiff as a pedestrian crossing Minnesota Avenue was under a legal duty to maintain a reasonable lookout for vehicular travel approaching from the direction from which traffic would be moving to avoid being struck and if you find from the evidence that the said plaintiff failed to maintain a reasonable lookout for approaching vehicular traffic, then such failure to maintain such lookout constituted negligence, and if you find that such negligence contributed in whole or in part in causing the collision with the individual defendant's automobile and the resulting injuries complained of herein by plaintiffs, then your verdict should be for the defendants.

You are also instructed, ladies and gentlemen of the jury, that the traffic and motor vehicle regulations for the District of Columbia provide that no pedestrian shall suddenly leave a curb or other place of safety and walk

178 or turn into the path of a vehicle which is so close that it is impossible for the driver to yield. If you find from the evidence that the infant plaintiff in this case walked or ran into the path of the indi-

vidual defendant's automobile when said automobile was so close to him that it was impossible for the defendant driver to avoid striking him, then such walking or running would be negligence. If you find that he did run or walk in violation of the regulation, and if you find from the evidence that such negligence contributed in whole or in part in causing the collision with defendant's automobile and the resulting injuries complained of herein by the plaintiffs, your verdict must be for the defendant. That is Section 52—part of 52 (a) of the traffic regulations.

You are also instructed that Section 53 of the traffic regulations were in full force and effect at the time of the collision. Section 53 reads as follows: "Every pedestrian crossing a roadway at any point other than within a marked cross-walk or within an unmarked cross-walk in an intersection shall yield the right of way to all vehicles upon the roadway."

You are further instructed that the infant plaintiff was crossing Minnesota Avenue at a place other than a cross-walk and it became and was his duty under the aforesaid regulations to yield the right of way to all vehicles upon the roadway which were proceeding so close thereto as to constitute a hazard to such crossing and if you find from the evidence that the said plaintiff failed to yield such right of way, then such failure constituted negligence, and if you further find from the evidence that such negligence contributed in whole or in part in causing the collision with said defendant's automobile and the resulting injuries complained of herein, then your verdict should be for the defendants.

179

You are also instructed, ladies and gentlemen of the jury, that the minor plaintiff Thomas Ball has testified that he looked before he attempted to cross Minnesota Avenue but that he did not see the automobile approaching. If you find from the evidence that the automobile was clearly visible when he looked, then you may reject

his testimony that he did not see the car because general human experience supports the inference that when one looks in the direction of an object clearly visible, he sees it and the failure of the infant plaintiff to look or his failure to see the approaching car when it was clearly visible would be negligence that would preclude a recovery by him and your verdict must be for the defendants unless you find by a preponderance of the evidence that the car at such time was at such a distance away as would make it safe for the minor plaintiff to cross Minnesota Avenue.

There is in issue in this case the question of agency, the question of employment, the relationship existing between the corporate defendant and the individual
180 defendant. The plaintiff claims at the time of the accident that the individual defendant was an agent of the corporate defendant. There is no question but that the individual defendant worked for Murphy Auto Parts, Inc.

The issue for you to determine is whether or not at the time of the accident the agent or employee was acting within the scope of his employment. Agency, ladies and gentlemen of the jury, is the relationship which results from the manifestation of consent by one person to another, that the other shall act on his behalf and subject to his control and consent by the other so to act. In other words, it is a contract, either expressed or implied upon a consideration or a gratuitous undertaking by which one of the parties confides to the other the management of some business to be transacted in his name or on his account and by which the other assumes to do the business and render an account of it. There is no particular formula, ladies and gentlemen of the jury, that will solve the problem whether at a particular moment a particular servant is engaged in his master's business, or is acting within the scope of his employment so as to render the master liable for his acts. A servant is

acting within the scope of his employment when he is engaged in doing for his master what he has been directed to do, or as it has been said, any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act, or a natu-
181 ral, direct and logical result of it is within the meaning of the phrase, scope of employment. The test is the nature of the tortuous act and its relation or non-relation to the acts which the actor was employed to do. Liability on the part of the employer is not limited to the employee's acts which promote the objects of the employment, the general idea being that in order to fix liability on the employer, the employee at the time of doing the wrongful must have been acting on behalf of the employer and not on his own account.

You are instructed that in determining whether the defendant James B. Murphy was working within the scope of his employment you may take into consideration all the circumstances surrounding that employment, and the declarations made by the defendant James B. Murphy at the scene of the collision, if you believe that he made them.

Also, you may consider James Murphy's denial if you believe that he made no such declaration. And, if, after viewing all the evidence, you believe that he was working within the scope of that employment, even though he may have had some personal business of his own at the same time, you are still justified in finding a verdict against the defendant Murphy Auto Parts, Inc., provided, of course, that you find that James Murphy was negligent at the time of the accident and that that negligence was the proximate cause of the accident.

182 The defendant Murphy Auto Parts Company, Inc., has been sued on the theory that the defendant James B. Murphy was acting as its servant, agent or employee and within the scope of his employment at the time of the events out of which the accident occurred.

If you find that the defendant James B. Murphy is not liable, then it becomes unnecessary to consider the question of agency, because in that event the defendant Murphy Auto Parts, Inc., may not be held liable even if the agency existed. Then of course your verdict would be for both defendants.

If you decide that the defendant James B. Murphy is liable, then you must decide whether at the time of his participation in events proximately causing the accident James B. Murphy was acting as the servant, agent or employee of Murphy Auto Parts Company, Inc., and within the scope of his employment.

If you find either that the defendant James B. Murphy was not at the time acting as the servant, agent or employee of the defendant Murphy Auto Parts Company, Inc., or was not acting within the scope of his employment, your verdict must be in favor of the defendant Murphy Auto Parts Company, even of course, as I say, if you find in favor of the plaintiffs against the defendant James B. Murphy.

You are also instructed that the defendant Murphy Auto Parts Company, Inc., can not be held liable
183 on account of any actions of the defendant James B. Murphy done outside the scope of his employment. The burden rests upon the plaintiffs to prove to your satisfaction by a preponderance of the evidence that at the time and place of the accident James B. Murphy was engaged in the performance of some duty of his employment connected with the transaction or furtherance of business of the Murphy Auto Parts Company, Inc., and unless you shall so find from a preponderance of the evidence, it will be your duty to return a verdict in favor of the defendant Murphy Auto Parts, Inc.

You are also instructed, ladies and gentlemen of the jury, that a person who, without any negligence on his part, is suddenly confronted with unexpected imminent danger or circumstances which create a reasonable ap-

prehension of danger, of imminent danger either to himself or to others, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments. His duty is to exercise only the care that an ordinary prudent person would exercise if confronted with the same unexpected danger under the same and similar circumstances.

If, at the moment, he does what appears to him to be the best thing to do and if his choice and manner of action are the same as might have been followed
184 by an ordinary prudent person under the same and similar conditions, he does all the law requires of him, although in the light of after events it should appear that a different course would have been better and safer.

In this respect you are instructed that while the Court has instructed you on the doctrine of imminent peril to the effect that a defendant is not required when confronted with a sudden emergency, to act with the same degree of care that he would under ordinary circumstances you are further instructed that this principle of law is only available to a person who is confronted with such peril without negligence on his own part.

The plaintiff in this case relies upon a doctrine which is known as the last clear chance. You need not concern yourselves with this doctrine unless and until you first shall have found in the evidence leading up to the accident in question both the plaintiff and the defendant were guilty of negligence. Should you find this to be the fact, then the doctrine of last clear chance may be invoked if you further find from the evidence that the following four elements existed: (1) that the plaintiff was in a position of danger;

(2) that the plaintiff was oblivious to his danger though if aware of it, he could have extricated himself

or was so situated as to be unable to extricate himself from his position of danger;

185 (3) That the defendant was aware or by the exercise of reasonable care should have been aware of the plaintiff's danger and obliviousness to his danger or inability to extricate himself from his position of danger; (4) that the defendant with means available to him, was able by his exercise of reasonable care to avoid striking the plaintiff after he became aware or should have become aware of his danger and obliviousness to his danger or inability to extricate himself from danger and he failed to do so.

If, under the instructions which I have given you, you find it is appropriate to consider the doctrine of the last clear chance and if you find further that each of the four elements existed with respect to the accident in question, then the negligence of the plaintiff would not bar him from a recovery.

I should like to say this also in reference to the doctrine of last clear chance that in considering this doctrine you should keep in mind that it was not intended and should not be permitted to violate the basic principle that liability must be founded on both negligence and proximate cause, also, that it may not be permitted to set aside the law of contributory negligence. It is one thing for a person's negligent conduct to place him in a dangerous position and then cease to operate as a proximate cause of the accident, but it is quite another thing for

186 his negligence to continue thereafter and actually cause or help to cause the accident.

The doctrine of last clear chance rests on this distinction, and its prime value is to aid in detecting which of the two conditions existed. Thus the doctrine is invoked to defeat the defense of contributory negligence in a case when, after the plaintiff's negligence has put him in a position of danger, its work as an efficient agent of causation ceases and it does not play a part in proxi-

mately causing the accident. When, on the other hand the person's negligence only places him in a position of danger, but thereafter continues and as a proximately causing factor, brings about or contributes in bringing about the accident, then the law of contributory negligence applies and such person may not recover.

Now then the issues are clearly drawn and the ones that you are to consider are these: 1. Was the defendant James B. Murphy negligent in the operation of his automobile on October 20, 1952 at or near the intersection of B Street and Minnesota Avenue, Southeast? If you answer that question in the negative, you will return a verdict for both defendants.

If you answer that in the affirmative, you have a second issue to determine: (2) Was that negligence of James B. Murphy a proximate cause of an injury to the Minor plaintiff? If you answer that question in the nega-
187 tive, the plaintiff is not entitled to recover and you shall return a verdict for both defendants. But if you answer it in the affirmative, you must answer a third question.

(3) Was the plaintiff, the minor plaintiff, negligent? If you find that he was not, after having found in plaintiff's favor on the other two issues, you must fix the amount of plaintiff's damages and return a verdict in his favor. If you find that the plaintiff was negligent, then you must determine a 4th issue:

(4) Did that negligence contribute in any degree as a proximate cause of the accident? If you find that it did your verdict must be for the defendant. But, if you find that it did not and you previously have found that there was negligence on the defendant's part which proximately caused Plaintiff's injury, then you must fix the amount of the plaintiff's damages and return a verdict in his favor. And of course, fifth, it is your consideration of the doctrine of last clear chance, as I have explained it to you, after you have answered the questions that both the plaintiff and the defendant were negligent.

As indicated in my instructions you should first determine the question of liability before you undertake to fix an amount that would compensate for damages found to have been suffered by the minor plaintiff.

The last issue for you to determine is the question of agency, the question of whether or not the individual defendant was acting within the scope of his employment at the time of the accident. If you find that he was by a preponderance of the evidence, then of course the corporation is just as liable as the defendant James B. Murphy would be if you find that he was negligent and his negligence was the proximate cause of the injury.

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If you find that James B. Murphy was on his own, was going home after a day's work, and that he was not acting within the scope of his employment at the time of the accident, then of course you must return a verdict for the defendant Murphy Auto Parts, Inc.

If you should find that the plaintiff is entitled to a verdict against the defendant it will then be your duty to award the plaintiff such amount of damages as will compensate him reasonably for all the detriment suffered by him and of which the defendant's negligence is found by you as the proximate cause whether such detriment could have been anticipated or not. The burden rests upon the plaintiff to prove by a preponderance of the evidence the elements of his damage, if any. You are not permitted to award plaintiff speculative damages by which term is meant compensation for prospective detriment which, although possible is remote, conjectural or speculative.

In other words, you are to base your verdict, if you find for the plaintiffs or either of them, as to future losses, not upon conjecture or speculation, but only as a preponderance of the evidence shows that there is a reasonable certainty that there will probably be future damage or suffering resulting from the origi-

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nal injury. Absolute certainty of prospective continuation of injury or loss need not necessarily be established. It is sufficient if the probability of that damage occurring is reasonably certain, in which event allowance should be made therefor. In other words, ladies and gentlemen of the jury, should you determine that the plaintiff is entitled to recover, you should compensate him for prospective detriment if it has been shown by a preponderance of the evidence that there is such a degree of probability of that detriment occurring as amounts to a reasonable certainty that it will result from the original injury. You may not include in any award to the plaintiffs anything by way of smart money or, as it is stated, punitive damages, that is, as punishment of the defendant or to make an example of him for the public good or to prevent other accidents. Such damages, of course, would be punitive rather than compensatory and the law does not authorize punitive damages in this type of action.

Neither the allegations of the complaint as to the amount of damages claimed to have been suffered nor the prayer asking for certain compensation is to
190 be considered by you in arriving at your verdict. I think the suit was for what, $150,000?

MR. AHERN: It was amended.

THE COURT: $150,000. That does not mean anything except that, of course in fixing your damages you could not exceed the maximum amount asked for in the complaint. If you find that the plaintiff is entitled to a verdict in arriving at the amount of the award, you shall determine each of the items of claimed detriment which I am now about to mention, provided that you find them to have been suffered by him as a proximate result of the defendant's negligence. If, after viewing all the evidence, you find in favor of the plaintiff Thomas Hall, you shall award him such sum as will fairly, reasonably and adequately compensate him for the damages you find he has sustained by reason of any physical in-

jury including injuries to his head, leg, brain, scars, pain, suffering, and mental anguish resulting from the said physical injury.

You are also instructed that if you find from the evidence that any of the said injuries that he has sustained are permanent in nature or are reasonably likely to continue for some time in the future, then you should award him such sums as would fairly, reasonably and adequately compensate him for the injuries, nervousness, scars, pain, suffering and mental anguish and any disabilities which are permanent or are reasonably certain to be suffered by him in the future.

191 That is in reference to the two cases that have been filed by the infant through his mother against the individual James B. Murphy and the corporate defendant Murphy Auto Parts. He is entitled to recover for what he has suffered and what he will continue to suffer and also for any scars that may be on him, and that is all. He can not recover for expenses. The items of detriment in the suit filed by George Ball and Rita Ball as parents against the parties, they being the mother and father of the infant, you are instructed that you should award them such sums as will fairly, reasonably and adequately compensate them for all the expenses incurred for medical treatment, X-rays, doctors' bills, hospitalization, transportation, and miscellaneous expenses, resulting from the injuries received by the infant plaintiff and if you find that the condition is reasonably certain to continue for some time in the future, you should award them an additional sum to cover such future expenses.

In fixing this amount, ladies and gentlemen of the jury, it will be an amount such as will, in your judgment fairly, fully and reasonably compensate the infant plaintiff for the injury suffered by him, and also for the expenses incurred by his parents as a result of his injury.

I do not mean that in your verdict you must partici-

larize or itemize all the matters I have just men-
192 tioned. Your verdict, if it is for the plaintiff, will be for a specific sum you will specify, that is, for both plaintiffs. But in arriving at that sum you may consider all the items that I have enumerated in the light of all the evidence.

Upon retiring to the jury room, you will select one of your number to act as foreman who will preside over your deliberations. You should approach the issues of this case as men and women of affairs in the manner in which you would approach any important matter that you have occasion to determine in the course of your every-day business. Consider it in the jury room deliberately and carefully, in the light of the instructions which the Court has given you and use the same common sense and same intelligence that you would employ in determining any important matter that you have to decide in the course of your own affairs. As you are aware, your verdict must be unanimous. When you have reached your verdict, please notify the Marshal.

Is there anything else, gentlemen?

MR. AHERN: May we come to the Bench?

* * * *

195 MR. BEASLEY: If your Honor please, first let me say that we had a full afternoon's conference in chambers on the prayers and discussed them following which the next morning I stated at the Bench my objections. I believe the Court of Appeals has said I not only have to do that but have to invite your attention at the conclusion of your charge. I don't care to specify them.

THE COURT: You can make them now as the ones I denied and granted them. So far as it is done now——

MR. BEASLEY: May we have the understanding that I am objecting to your charging or failing to charge, con-

trary to my objections, on prayers previously admitted and ruled upon.

196 MR. JOHNSON: I would like to——

THE COURT: Have the same understanding?

MR. JOHNSON: Yes.

THE COURT: All right.

* * * *

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IN THE

Supreme Court of the United States

October Term, 1957

No. 687

MURPHY AUTO PARTS CO., INC.,
Petitioner,

v.

THOMAS CHARLES BALL, through his next friend,
RITA H. BALL,
and
GEORGE J. BALL, SR., and RITA H. BALL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In The

Supreme Court of the United States

October Term, 1957

No.

Murphy Auto Parts Co., Inc.,
Petitioner,

v.

Thomas Charles Ball, through his next friend,
Rita H. Ball,
and
George J. Ball, Sr., and Rita H. Ball,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Murphy Auto Parts Co., Inc., respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, entered in the above captioned case, affirming the judgment of the United States District Court for the District of Columbia.

OPINION BELOW

The United States Court of Appeals for the District of Columbia Circuit, in an opinion and judgment entered October 25, 1957 (R. 118-125) affirmed the judgment of

the United States District Court for the District of Columbia, entered on a jury verdict in consolidated actions for damages for personal injuries, prosecuted by the minor plaintiff, Thomas Charles Ball, and his parents, George J. Ball, Sr., and Rita H. Ball, against this Petitioner, and against one James Murphy, an employee of the Petitioner, owner and driver of an automobile which collided with and injured said minor plaintiff.

Your Petitioner moved for a rehearing in banc on November 8, 1957, (R. 126-133), and said petition was denied November 22, 1957 (R. 134).

The decision below has not been officially reported. A copy of the opinion is hereto annexed. (Appendix).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under the provisions of Title 28, Section 1254(1), of the United States Code.

QUESTIONS PRESENTED

1. In direct conflict with the decision of another Circuit Court of Appeals on the same matter, and contrary to the applicable decisions of this Court, the Court below has sanctioned a radical departure from the fundamental substantive law of agency by sustaining the admission into evidence of the hearsay declaration of an alleged agent as the only proof that the agent was engaged within the scope of his employment at the time the injuries were inflicted by him on the minor plaintiff.

2. The opinion below, contrary to the applicable decisions of this Court, declares the res gestae exception to the evidentiary rule against hearsay testimony to be an exception to the substantive principle of agency which requires agency to be established by independent evidence as a condition precedent to the admission of declarations of an agent sought to bind his principal.

3. Contrary to the applicable decisions of this Court, and in direct conflict with the decision of another Circuit Court of Appeals, and against the great weight of authority in the United States, the Court below, in its opinion, has eliminated as "spurious" the fundamental rule of evidence that a spontaneous utterance, to be admissible under the res gestae rule, must explain or "illuminate" the exciting event by which it is alleged to have been prompted and which is the subject in issue.

4. The decision below concedes the existence of general confusion among the courts of this country between vicarious admissions and excited utterances as applied to the law of agency, and in attempting to rationalize the problems presented has created a precedent which imperils the rights of all employers in actions for the tortious acts of their employees.

5. The decision has created questions of gravity and importance which ought to be settled by this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, in pertinent part, provides:

> "No person shall be * * * * * deprived of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

On October 20, 1952, James Murphy, an employee of the Petitioner, terminated the duties of his employment in Petitioner's store in Takoma Park, D.C., at 5:00 P.M., and an hour and a half later, while off duty and driving his own private automobile toward his home in Southeast Washington in pursuit of purposes entirely his own, collided with the respondent, Thomas Charles Ball, a minor. About a month thereafter, said minor, through his mother and next friend, Rita B. Ball, brought an action for damages against James Murphy in the District Court.

Some sixteen months later, the same plaintiff filed another action in the same Court against the Petitioner, alleging that at the time of the accident which occasioned his injuries James Murphy was operating his automobile on business of the Petitioner. Thereafter, Mrs. Ball and her husband, George J. Ball, Sr., filed another action in said Court for damages consequent upon the injuries to their son, naming both James Murphy and this Petitioner as defendants. These three actions were consolidated and tried to a jury in June, 1956. The jury returned verdicts in favor of all plaintiffs against both defendants, and the Court entered judgment accordingly.

Discussion of the facts of the accident is not necessary for the reason that this appeal concerns only the question of agency involved.

At the trial the plaintiffs were permitted, over objection, to introduce in evidence testimony of Rita H. Ball to the effect that when she arrived at the scene of the accident, after her son had been removed to a nearby doctor's office, she was approached by James Murphy, who told her "*that he was sorry, that he hoped my son wasn't seriously hurt, he had to call on a customer and was in a bit of a hurry to get home.*" (R. 81A). The manifest purpose of this evidence was to prove that James Murphy was engaged on an errand for his employer at the time and place of the accident, and thereby to establish liability on the part of the employer. The trial judge ruled that the declaration was a part of the res gestae, and admitted it for the purpose for which it was introduced, as aforesaid (R. 81A-87A).

James Murphy did not appeal from the judgment against him.

The Petitioner contended on appeal that the declaration was inadmissible to prove agency, and that without it the evidence was insufficient to prove agency, and that

the trial judge should have granted motions for directed verdict (See Supplemental Record on Appeal).

The Court of Appeals in its opinion, finds that the dispute in issue before the trial court was *"whether James Murphy was engaged in his employer's business at the precise time appellee's injuries were inflicted"* and, upon the record, concludes that the *apppellant "correctly points out that absent the alleged utterance of James Murphy there was not sufficient evidence on which a jury could find that he was acting within the scope of his employment when the accident occurred."* (R. 120). The Court of Appeals thus confined itself, and properly so, to the single clearcut question whether the declaration of the agent, standing by itself, was sufficient to establish liability on the part of the employer. If it was not, the defense motions for a directed verdict should have been sustained, and the judgment reversed. The Court below held the declaration admissible, and affirmed the judgment of the District Court. (R. 118-124).

REASONS FOR GRANTING CERTIORARI

I.

This Court has held that the hearsay declarations of an agent as to the scope of his authority is not admissible to bind his principal unless the fact of agency is first proven by other independent evidence.

First Unitarian Soc. v. *Falkner*, 91 U.S. 415, 417, 23 L.Ed. 283.

United States v. *Boyd*, 46 U.S. (6 How.) 29, 50, 12 L. Ed. 36

Union Packet Co. v. *Clough*, 20 Wall. 528, 22 L.Ed. 406

American L. Ins. Co. v. *Mahone*, 21 Wall. 152, 22 L.Ed. 593

Vicksburg & Meridian R. Co. v. *O'Brien*, 119 U.S. 99, 7 S.Ct. 118, 30 L.Ed. 299

Winchester & Partridge Mfg. Co. v. *Creary*, 116 U.S. 161, 29 L.Ed. 591, 6 S.Ct. 369

Goetz v. *Bank of Kansas*, 119 U.S. 551, 30 L.Ed. 515, 7 S.Ct. 318

Ins. Co. v. *Moseley*, 8 Wall. 397, 19 L.Ed. 437 (Dissenting opinion of Mr. Justice Clifford)

The decision below holds the contrary, and is also in direct conflict with the almost identical case of *Dudley* v. *Preston Motor Company* (1931) 51 F.2d 8, in the Sixth Circuit Court of Appeals. There an employee, driving his employer's automobile, made a declaration alleged to have been a part of the res gestae, to the effect that he was on business for his employer at the time of the accident involved. The declaration was offered in evidence as proof of the employer's liability. The trial court excluded the declaration, and the Circuit Court of Appeals affirmed, stating:

> "Considering the evidence in its most favorable light for appellant, we conclude that it does not substantially show that at the time of the accident Roberts was engaged in any business for appellee or that appellee had either expressly or impliedly authorized him to use the automobile upon that occasion. We think that he was upon a trip entirely personal to himself, and that there is no substantial relevant evidence to the contrary, and the judgment therefore should be affirmed. See *Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 254, 45 S.Ct. 300 69 L.Ed. 597; *American Oil Co.* v. *Frederici*, 47 F. 2d 54, 57 C.C.A. 6.
>
> "Appellant testified that at the time of the accident, and after his son had been taken out of the wrecked car, Roberts made the statement to him which he repeated the succeeding day in the presence of Preston and Kilpatrick as above indicated. This testimony was offered as a part of the res gestae, and its introduction was denied. We think there was no error in its denial. It threw no light upon the cause of the collision. The manifest purpose of appellant in the introduction of it was to use this declaration of Roberts as evidence of his agency for which purposes it was, of course, incompetent."

The decision in *Dudley* is in conformity with the decisions of this Court, above referred to, and with numerous cases collected in 163 A.L.R. 1980, and 3 A.L.R. 2d 606, under the heading:

> "By the weight of authority, the declaration of one alleged to have caused an accident that he was employed by the defendant, or that he was then engaged in some business for the defendant, is inadmissible, even though made under such conditions as would otherwise qualify it as part of the res gestae."

II.

This Court has so firmly recognized that hearsay evidence is inadmissible to prove a fact capable of being established by evidence *aliunde* that it would seem unnecessary here to cite the numerous decisions to that effect. This Petitioner submits that the hearsay admission of an agent is no less hearsay or any more binding upon the principal because it is an "excited utterance." The opinion below reaches an opposite conclusion by a fallacious rationalization of the two distinct and unrelated principles of vicarious admissions and excited utterances, in the process of which a novel theory of "reliability" is evolved by the Court, which clashes with the rules of law and evidence on the subject as laid down by the decisions of this Court above noted. The reasoning of the opinion is as follows:

(a) First, the Court, departing from the established principles of the above cases, reasons that the rationale of excluding statements of an employee concerning his authority seems to rest, not upon the assumed want of authority of the agent to make them, but upon the "*assumed want of reliability* of the statements."

(b) Reasoning from this legally unsupportable premises, the opinion holds that the "want of reliability" of an agent's declarations is cured if they are within the

area embraced by the spontaneous declaration exception to the rule gainst hearsay evidence. Without citation of authority to support this proposition, the Court places itself again in conflict with the decision in *Dudley* and the decisions of this Court above cited, and with the great weight of authority in the United States, which hold that authority must be shown.

(c) Proceeding, the Court seeks to close its syllogism by concluding that the vicarious admissions rule, "a substantive rule of agency," which would otherwise exclude the declaration of the agent in this case, may be wholly disregarded if the declaration qualifies as a spontaneous declaration under the evidentiary rule of res gestae.

Discovering a serious obstacle to its reasoning, arising by reason of a fundamental requirement of the res gestae rule, the Court committed a further transgression of the settled law by simply obliterating it. "A majority of decided cases and authorities" says the Court, "appear to require the presence of three elements in order for an out of court statement to qualify as an excited utterance or spontaneous declaration." (R. 123). One of these important elements—that "the utterance must explain or illuminate the exciting event"—is absent from the evidence in this case, because the alleged declaration of James Murphy, above quoted, clearly did not shed any light upon the facts of the accident, but was merely an expression of concern and sympathy over the condition of the injured boy, coupled with a narrative of circumstances entirely disconnected with the accident. However, having newly constructed a radical and untenable theory of "reliability" as a substitute for the rule of agency, the Court was enabled easily to resolve the difficulty by finding that the element is "spurious", because, it says, the "reliability of the utterance is not inflexibly dependent upon the subject matter of the utterance." Thereby again the bar to admissibility of the hearsay admissions of an

agent was let down to bind the principal, contrary to the decisions of this Court. See *Beaver* v. *Taylor*, 68 U.S. 637, 17 L.Ed. 601. And again the opinion conflicts with the Sixth Circuit Court of Appeals in *Dudley* v. *Preston Motor Company*, supra., and the weight of judicial authority in the United States.

Wigmore on Evidence is erroneously construed by the opinion below to argue that the substantive rule of agency in this case must yield to the evidenciary rule of res gestae as to the requirements for the establishment of the authority of an agent to bind his principal (R. 122). Professor Wigmore holds the exact opposite (See quotation at R. 128-129).

III.

The decision below has created a dangerous rule of evidence, which substitutes for the substantive rule of agency required to be applied in the exercise of judicial judgment subject to examination and correction by the appellate court, a discretionary power of the trial court to disregard the substantive law if it decides that the agent's declaration is truly spontaneous, as weighed by the altered standard which eliminates the essential element of relevancy.

If found to be spontaneous in the exercise of the trial court's discretionary judgment, the opinion below says the declaration is admissible "*if it is relevant*". Relevant to what? Relevant to the "exciting event"? No. The opinion eliminates the element of relevancy from the res gestae rule. Therefore, it is clear that the Court means relevancy with respect to the question of agency; and here the opinion repudiates its own argument and conclusion, for the applicable decisions of this Court require evidence of agency independent of the declaration of the agent himself to be introduced as a condition precedent to the acceptance of his declaration as against the prin-

cipal. This is a substantive rule of law which the trial court is bound to apply, and as to which it cannot lawfully exercise discretion.

IV.

It is respectfully submitted that there is no more effective way of depriving a party of the protection of the Fifth Amendment to the Constitution of the United States than to deny to him the benefit of the rules of evidence which the Courts have established for the protection and preservation of his rights and property. The opinion below is violative of due process in the several departures from fundamental principles above enumerated.

V.

The opinion below is, as has been shown, confusing and self-contradictory. If allowed to stand, a rule of evidence is created by which all employers, including the United States Government itself (see Federal Tort Claims Act) are put to the peril that an employee, off duty, driving his own automobile in pursuit of his private affairs, may exclaim excitedly following an accident that he was engaged at the time on an errand for his employer and, regardless of the truth of his declaration, and without any other proof of agency, his "excited utterance" may be admitted in evidence against the employer and subject him to a judgment for damages.

VI.

Questions of gravity and importance are here presented and required to be settled by this Court, for it is perfectly obvious that the opinion below seizes upon what is regarded as confusion and turns it into chaos. Illustrative of this statement are such expressions contained in the opinion, as follows:

"The decided cases dealing with the admissibility of statements of an employee, concerning his authority, are in confusion as to the basis for receiving such evidence."

"There has been general failure to recognize that the rationale of the excited utterance doctrine furnishes a separate and distinct basis for admissibility, not to be confused with the vicarious admissions rule."

"Unfortunately few courts have recognized this and there has been a general tendency to blur the requirements of vicarious utterances and excited utterances."

The Court below needed only to give effect to the established principles of agency and rules of evidence as laid down by this Court, and other Federal courts. Instead, the Court has carried the rule concerning spontaneous utterances into an entirely new field, and in doing so has departed from the universally accepted legal standards and announced a precedent destructive of the rights of all business men and employers.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this petition for certiorari should be granted.

Respectfully submitted:

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Washington 5, D.C.

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13599

MURPHY AUTO PARTS CO., INC., APPELLANT

v.

THOMAS CHARLES BALL, through his next friend, RITA H. BALL, APPELLEE

No. 13600

MURPHY AUTO PARTS CO., INC., APPELLANT

v.

GEORGE J. BALL, SR. and RITA H. BALL, APPELLEES

Appeals from the United States District Court for the District of Columbia

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Decided October 25, 1957

Mr. R. Sidney Johnson, with whom *Mr. Guy B. Hardy* was on the brief, for appellant.

Mr. Albert J. Ahern, Jr., with whom *Mr. James J. Laughlin* was on the brief, for appellees.

Before BAZELON, FAHY and BURGER, *Circuit Judges*.

BURGER, Circuit Judge: The issue presented by this appeal is whether an alleged out of court utterance of an employee, driving his own car after working hours, stating that he was on an errand for his employer, is admissible to show that he was in fact engaged in his employer's business at the time of a collision with a pedestrian, where the statement is a spontaneous declaration or excited utterance.

The facts are essential to a complete understanding of the precise legal issues presented. Appellee Thomas Ball, a minor, was injured in 1952 when struck by a passenger car owned and driven by James Murphy. James Murphy was employed as a clerk by his stepfather's business concern, appellant here. The injury occurred at 6:30 P.M., one and one-half hour after his regular work day which terminated at 5:00 P.M. Appellee Rita Ball, the mother of the injured child, testified that immediately after the injury and at the scene of the accident, James Murphy "told me that he was sorry, that he hoped my son wasn't seriously hurt, he had to call on a customer and was in a bit of a hurry to get home." James Murphy denied making this or any statement to Mrs. Ball.

It is admitted that James Murphy was employed as a clerk by Murphy Auto Parts Co. on the day of the injury to the minor appellee. It was shown that he received a regular allowance for auto expense[1] but both Murphy and his employer insisted all Murphy's duties were inside clerical work and denied he was authorized to use his personal car for company business. The record shows that at a later date, some months after the acci-

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[1] The books of appellant corporation show James Murphy received $10 a week car allowance in addition to his salary. Officers of appellant corporation testified this was simply a means of giving James added compensation and to pay him for his cost of transportation to and from work.

dent, James Murphy did make calls on customers using his own car. Thus it is clear that there was a relationship of master and servant, leaving in dispute whether James Murphy was engaged in his employer's business at the precise time appellee's injuries were inflicted. The utterances attributed to James Murphy immediately after the collision tend to show he was at that time on an errand for his employer, and if properly received furnish adequate support for the findings of the jury.

Appellant relies first on the general proposition that the declaration of an agent concerning his authority is inadmissible against his employer[2] and correctly points out that absent the alleged utterance of James Murphy there was not sufficient evidence on which a jury could find that he was acting within the scope of his employment when the accident occurred. Second, appellant urges that under the so-called excited utterance rule such utterances are admissible only and narrowly to explain the exciting occurrence and for no other purpose.

The decided cases dealing with the admissibility of statements of an employee, concerning his authority, are in confusion as to the basis for receiving such evidence. The broadly stated proposition that the authority of an agent cannot be proved "out of the mouth of the agent" is true only if it is considered with its numerous exceptions, which taken together render the general proposition one of relatively little significance. The rationale of excluding such statements seems to rest on the assumed want of reliability; the exceptions to the "rule" tend to rest on finding reliability in the circumstances of the utterance. For example, when made in court under oath subject to the tests of cross examination and penalties of

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[2] See, *e.g.*, Russell v. Washington Sav. Bank, 23 App.D.C. 398 (1904); RESTATEMENT, AGENCY § 285 (1933); 3 A.L.R. 2d 598 (1949) and prior annotations there cited, covering comprehensive discussion of this subject.

perjury, those circumstances are regarded as making the statement sufficiently trustworthy to be received.[3] Or, where other independent evidence of authority is present, the assumed want of reliability of the statements is regarded as sufficiently cured by that corroboration.[4] A third category of circumstances regarded as curing the want of reliability or reasonably insuring reliability is the area embraced within the spontaneous declaration, or more aptly called, the excited utterance exception.[5] Here we are still dealing with hearsay but its want of reliability is regarded as satisfied by the circumstances in which the statement is made. The prompt, spontaneous character of the utterance under the impact and stress of the exciting event which "stills the reflective process" provides the circumstances, which, experience shows us, make for reliability.

There has been a general failure to recognize that the rationale of the excited utterance doctrine furnishes a separate and distinct basis for admissibility, not to be confused with the vicarious admissions rule. Under the vicarious admissions rule, a substantive rule of agency, an agent's out of court statements as to his authority (or any other relevant matter) may be received even though hearsay, in other evidence proves he was authorized to speak. There the element of reliability is not a problem since it is the *fact* of the utterance, not its truth which is in issue.[6]

Thus, if the words qualify as a vicarious utterance, *i.e.*, the authorized words of the principal uttered by the agent, it is not necessary that they also qualify as ex-

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[3] See MECHAM, AGENCY § 291 (1914).

[4] See *id.* § 1774.

[5] WIGMORE, EVIDENCE § 1745 (1940).

[6] See RESTATEMENT, AGENCY §§ 285, 286 (1933); WIGMORE, EVIDENCE § 1078 (1940).

cited utterances. If they qualify as excited utterances there is no rational basis for demanding more, since the want of reliability has been cured by the circumstances, as has been pointed out.

Unfortunately few courts have recognized this and there has been a general tendency to blur the requirements of vicarious utterances and excited utterances.[7] Mecham dispels this confusion, stating:[8]

> "Although they thus cannot be regarded as *authorized*, the declarations and admissions of an agent may often be put in evidence upon an entirely different ground, namely, that they constitute [a spontaneous utterance] . . . . The use here . . . does not necessarily depend upon the law of agency at all. It is a rule of evidence, and is just as applicable in a proper case to one who was not an agent at all as to one who was an agent . . . . The theory is that the spontaneous utterances of one who speaks under the excitement of the moment and before he has had time to deliberate—to concoct a self-favoring story—are likely to be true."

Professor Wigmore agrees:[9]

> "That there are two distinct and unrelated principles involved must be apparent; and the sooner the Courts insist on keeping them apart, the better . . . ."

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[7] Undoubtedly some of the confusion between vicarious utterances and excited utterances is due to the use of *res gestae* for either doctrine. See WIGMORE, EVIDENCE §§ 1768-9 (1940). Use of the term res gestae has been criticized because its meanings "are as numerous as the various cures for rheumatism, and about as useful." Coryell v. Clifford F. Reid Inc., 117 Cal.App. 534, 4 P.2d 295 (1931) (dissent).

[8] MECHAM, AGENCY § 1793 (1914). For a case applying, if not recognizing this principle, see Chantry v. Pettit Motor Co., 156 S.C. 1, 152 S.E. 753 (1930), and full discussion in the dissent. *Cf.* Mancuso v. Hurwitz-Mintz Furn. Co., 183 So. 451 (La.App. 1939); Lowie v. Dixie Stores Co., 172 S.C. 468, 174 S.E. 394 (1934).

[9] WIGMORE, EVIDENCE § 1078 (1940).

We are satisfied, therefore, that when out of court statements qualify as excited utterances, the hearsay rule removes its bar to admissibility. The fact that the utterer is an agent is immaterial so far as admissibility as an excited utterance is concerned.[10]

We turn now to appellant's argument that the part of the alleged utterance of James Murphy tending to show that he was on an errand for his employer did not qualify as an excited utterance, because is did not illuminate the exciting event but rather went to the issue of his authority.[11]

A majority of decided cases and authorities appear to require the presence of three elements in order for an out of court statement to qualify as an excited utterance or spontaneous declaration. These are (a) an exciting event (b) an utterance prompted by the exciting event without time to reflect, *i.e.*, dominated by the nervous excitement of the event, and (c) the utterance must explain or illuminate the exciting event.[12] But a careful analysis of the entire subject demonstrates that the third element, mechanically and narrowly construed, is a spurious element,[13] and that reliability of the utterance is not inflexibly dependent upon the subject matter of the utterance.

The test for receiving the utterance, therefore, should be whether it mets the first two requirements of a spon-

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[10] See WIGMORE, EVIDENCE § 1756a (1940); RESTATEMENT, AGENCY § 289, comment (d) (1933); Note, *Theoretical Bases of Admitting Agent's Declarations*, 37 KY.L.J. 117 (1949).

[11] See Dudley v. Preston Motor Co., 51 F.2d 8 (6th Cir. 1931); Deater v. Penn Mach. Co., 311 Pa. 291, 166 Atl. 846 (1933).

[12] WIGMORE, EVIDENCE §§ 1750, 1754 (1940).

[13] As Wigmore points out this third element has been erroneously carried over from the verbal act doctrine. WIGMORE, EVIDENCE §§ 1752, 1754 (1940).

taneous declaration or excited utterance referred to earlier. This lies essentially with the trial court, and not unlike the evaluation of credibility is one based in part, at least, on observation of the witness, the context of the statement and all surrounding circumstances. It should be kept in mind that as soon as the excited utterance goes beyond description of the exciting event and deals with past facts or with the future it may tend to take on a reflective quality and must be more carefully scrutinized with respect to the second element, that of true spontaneity. In other words, the very fact that the utterance is not descriptive of the exciting event is one of the factors which the trial court must take into account in the evaluation of whether the statement is truly a spontaneous, impulsive expression excited by the event.[14] Most often the excited utterance, as a practical matter, relates to the exciting cause, *i.e.*, description of an accident, an attack, etc., but if the utterance goes beyond a description of the occurrence and still meets the other tests of the excited utterance rule, we think it should be received if it is relevant.[15]

We hold that the alleged out of court statement of James Murphy, uttered at the time of the accident, to the effect that he was on an errand for his employer, and expressly found by the trial court to have been an excited utterance, was properly received in evidence as such.

Affirmed.

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[14] "The purport of the statement and its relation to the exciting event should be merely matters to be considered in determining whether the declaration was probably spontaneous or was reflective." MCCORMICK, EVIDENCE § 272 n. 15 (1954).

[15] See Metropolitan R. Co. v. Collins, 1 App.D.C. 383 (1893), which suggests that the trial court should use its discretion more cautiously when the utterer is an agent, and may have a self-interest in claiming to be within the scope of his employment.

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v.

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and

GEORGE J. BALL, SR., and RITA H. BALL, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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JURISDICTIONAL STATEMENT

Judgment of the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the United States District Court for the District of Columbia (Petitioner's Appendix 12 through 18). The decision was a unanimous opinion by the

United States Court of Appeals for the District of Columbia Circuit (Petitioner's Appendix 12 through 18). The petitioner moved for a rehearing in banc and on November 22, 1957 a unanimous order was entered denying the petition for rehearing in banc.

QUESTIONS PRESENTED

1. Whether the petitioner has presented a Federal question justifying review by this Court when the opinion clearly shows that the United States Court of Appeals for the District of Columbia Circuit in its opinion enunciated a rule of evidence with respect to the admission of a res gestae declaration thus clearly showing that there is no Federal question or conflict in the Circuits justifying review by this Court.

CONSTITUTIONAL PROVISIONS

There are no constitutional provisions involved and this case merely concerns the correctness of the trial court's discretion in admitting an excited utterance shortly after an accident involving an employee of the petitioner.

COUNTERSTATEMENT OF THE CASE

Contrary to the statement of the case by the petitioner the evidence showed that the employee Murphy was a salesman and that he called upon customers between 8 o'clock in the morning and 5 P.M. This was shown by petitioner's answer which was filed to the complaint and offered in evidence as an admission against interest. There was also introduced in evidence the fact that the petitioner paid the employee Murphy $10 a week for the use of his automobile. At the trial the petitioner denied that the $10 per

week was given to his employee Murphy for the use of his automobile. However, his business records were subpoenaed and close examination showed that business deductions were taken by the petitioner for this payment of $10 per week (R. 56 A to 37 A). The spontaneous utterance which was admitted in this case was clearly a part of the res gestae and there had been prior testimony establishing the employer-employee relationship (R. 81 A). Judgment was entered in favor of the respondent. The Court of Appeals for the District of Columbia unanimously affirmed in its written opinion (Petitioner's App. 12-18) and a unanimouse order was entered by all nine judges denying the rehearing in banc.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

There is no Federal issue presented in this appeal. There is an absence of a constitutional issue. There is no conflict between the Circuits. The ruling in this case on the admission of a res gestae declaration is an exclusive right to be determined by the Court of Appeals for the District of Columbia insofar as it affects the District of Columbia. See *Griffin* v. *United States*, 336 U.S. 704. This petition is in effect an attempt to ask this Court to review a discretionary ruling of the trial judge admitting in evidence an excited utterance.

This Court has before it the lengthy opinion of the United States Court of Appeals for the District of Columbia Circuit in which all the authorities are discussed pro and con on the admission of a spontaneous declaration. It is thus apparent that the only issue involved in this appeal was the correctness or incorrectness of the trial judge's ruling in admitting the declaration of the employee James B. Murphy immediately

after the accident in this case. The petitioner attempts to state that the ruling in this case is contrary to *Dudley* v. *Preston Motor Co.* (1931), 51 F. 2d 8. This contention is unsound for two reasons:

1. An inspection of the Preston Motor Co. case which is cited in the opinion of the Court of Appeals for the District of Columbia shows that it is plainly distinguishable. In the Preston case there had been no independent evidence to establish the employee-relationship when the declaration was received. In this case there was such independent evidence in the form of the answer filed by the petitioner in which he admitted that the employee James B. Murphy called upon customers. There was also received in evidence in this case the books of account which showed that the employee James B. Murphy received $10 per week for the use of his automobile in calling upon customers. As cited at Page 16 of Petitioner's Appendix, the ruling of the trial judge and the Court of Appeals for the District of Columbia is sustained by the following authorities:

> "Mecham, Agency Section 1793 (1914). For a case applying, if not recognizing this principle, see Chantry v. Pettit Motor Co., 156 S.C. 1, 152 S.E. 753 (1930), and full discussion in the dissent. Cf. Mancuso v. Hurwitz-Mintz Furn. Co., 183 So. 451 (La. App. 1939); Lowie v. Dixie Stores Co., 172 S.C. 468, 174 S.E. 394 (1934)."

Therefore, an inspection of the record shows that there is no conflict between the ruling of the present case and the ruling of the Sixth Circuit. However, there is an even more controlling reason why, assuming arguendo there was a conflict between the Court of Appeals for the District of Columbia and the Sixth

Circuit, it would not justify review by this Court because the Court of Appeals for the District of Columbia acts in a special way distinguishable from all other Circuit Courts when it rules on the admission or reception or rejection of evidence for courts in the District of Columbia. That the United States Court of Appeals for the District of Columbia Circuit has a special function insofar as the District of Columbia is concerned in announcing rules of evidence is ably discussed by Mr. Justice Frankfurter in *Griffin* v. *United States*, 336 U.S. 704 where Mr. Justice Frankfurter stated:

> "If Congress can enact substantive rules of criminal law exclusively for the District of Columbia, *the Court of Appeals for the District of Columbia ought not to be denied opportunity to formulate rules of evidence appropriate for the District, so long as the rules chosen do not offend statutory or constitutional limitations.* * * * But even assuming that the 'federal rule' is that the evidence described in the motion for a new trial would be admissible, *it does not follow that it must also be the rule for the District of Columbia. This Court, in its decisions, and Congress, in its enactment of statutes, have often recognized the appropriateness of one rule for the District and another for other jurisdictions so far as they are subject to federal law.*"

Thus it is apparent from the above that the Court of Appeals for the District of Columbia has merely affirmed the discretionary ruling of the trial judge on the admissibility of a spontaneous utterance.

2. Jurisdictional review by certiorari should be sparingly exercised and should be limited to cases of peculiar gravity and general importance. *Ex Parte*

Lau Ow Bew, 12 S. Ct. 45, 141 U.S. 583; *Hamilton Brown Shoe Co.* v. *Wolf*, 36 S. Ct. 269, 240 U.S. 251.

None of the decisions of this Court cited at Page 5 of the petitioner's petition for certiorari are in point. In summarizing them succinctly, *First Unitarian Soc.* v. *Falkner*, 91 U.S. 415, involved a vicarious relationship and did not concern the admissibility or inadmissibility of a res gestae declaration. In *Vicksburg & Meridian R. Co.* v. *O'Brien*, 119 U.S. 99, and *Union Packet Co.* v. *Clough*, 22 L. Ed. 405, the decisions specifically pointed out that the declarations were not admissible since they were not part of the res gestae, the declaration of the Vicksburg case occurring two days after the exciting event.

The present case is divested of any constitutional issue or Federal question and contains none of the requirements set up by Rule 38(5)(a)(b)(c) of this Court for the granting of certiorari. The present opinion is merely the affirmance of a discretionary ruling of the trial judge in admitting an excited utterance where there had been independent evidence establishing the employee relationship between the employee James B. Murphy and the petitioner.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for writ of certiorari should be denied.

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